

## 1 SENATE BILL NO. 248

2 INTRODUCED BY B. STORY

3

4 A BILL FOR AN ACT ENTITLED: "AN ACT RATIFYING THE UNITED STATES OF AMERICA, DEPARTMENT OF AGRICULTURE, FOREST  
5 SERVICE-MONTANA COMPACT; PROVIDING FOR A CHANGE IN APPROPRIATION RIGHT TO INSTREAM FLOW IN CERTAIN INSTANCES;  
6 PROVIDING ADDITIONAL CRITERIA THAT MUST BE MET BY THE UNITED STATES DEPARTMENT OF AGRICULTURE, FOREST SERVICE TO BE  
7 ABLE TO CHANGE AN APPROPRIATION RIGHT TO INSTREAM FLOW; REQUIRING APPLICANTS TO SUBMIT PROOF OF ANY WRITTEN SPECIAL  
8 USE AUTHORIZATION REQUIRED BY FEDERAL LAW TO OCCUPY, USE, OR TRAVERSE NATIONAL FOREST SYSTEM LANDS FOR THE PURPOSE  
9 OF DIVERSION, IMPOUNDMENT, STORAGE, TRANSPORTATION, WITHDRAWAL, USE, OR DISTRIBUTION OF WATER IN CERTAIN INSTANCES;  
10 REQUIRING THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION TO ADOPT RULES NECESSARY FOR STATE WATER  
11 RESERVATIONS; PROVIDING FOR PROCESSING OF STATE WATER RESERVATIONS FOR THE UNITED STATES DEPARTMENT OF  
12 AGRICULTURE, FOREST SERVICE IN ALL BASINS IN MONTANA; AMENDING SECTIONS 85-2-102, 85-2-302, 85-2-306, 85-2-308, 85-2-310, 85-2-311,  
13 85-2-312, 85-2-316, 85-2-319, 85-2-331, 85-2-336, 85-2-341, 85-2-343, 85-2-344, 85-2-401, AND 85-2-402, MCA; AND PROVIDING AN IMMEDIATE  
14 EFFECTIVE DATE."

15

16 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

17

18 NEW SECTION. **Section 1. United States of America, department of agriculture, forest service-Montana compact ratified.** The compact  
19 entered into by the state of Montana and the United States of America, Department of Agriculture, Forest Service and filed with the secretary of state of  
20 the state of Montana under the provisions of 85-2-702 on [date of filing], is ratified. The compact is as follows:

21

WATER RIGHTS COMPACT

## 1 STATE OF MONTANA

## 2 UNITED STATES OF AMERICA, DEPARTMENT OF AGRICULTURE, FOREST SERVICE

3 This Compact is entered into by the State of Montana ("State") and the United States of America ("United States") to settle for all time any and all claims  
4 existing on the Effective Date of This Compact to federal reserved water rights for National Forest System Lands administered by the Forest Service, an  
5 agency of the United States Department of Agriculture ("Forest Service"), within the State of Montana.

## 6 RECITALS

7 WHEREAS, the State of Montana, in 1979, pursuant to Title 85, chapter 2, of the Montana Code Annotated, commenced a general adjudication  
8 of the rights to the use of water within the State of Montana, including all federal reserved and appropriative water rights;

9 WHEREAS, section 85-2-703, MCA, provides that the State may negotiate compacts concerning the equitable division and apportionment of water  
10 between the State and its people and the federal government with claims to non-Indian federal reserved water rights within the State of Montana;

11 WHEREAS, section 85-2-228, MCA, provides that a federal reserved water right with a priority date of July 1, 1973, or later be subject to the same  
12 process and adjudication as a federal reserved water right with a priority date before July 1, 1973;

13 WHEREAS, the United States wishes to secure water rights to fulfill the purposes of National Forest System Lands in the State of Montana;

14 WHEREAS, the United States, in quantifying and securing water rights to meet National Forest System purposes, seeks cooperatively to  
15 accommodate the interests of the State and its citizens and to avoid the conflict and uncertainty inherent in litigating federal reserved water rights claims.  
16 The United States believes that the natural flows needed for favorable conditions of flow, for fisheries, and for other resource management goals and  
17 obligations on National Forest System Lands can be achieved, without materially affecting the interests of the United States, through the use of state law  
18 as provided in this Compact.

19 WHEREAS, the United States Attorney General or a duly designated official of the United States Department of Justice has authority to execute  
20 this Compact on behalf of the United States pursuant to the authority to settle litigation contained in 28 U.S.C. 516 and 517;

21 WHEREAS, The Secretary of Agriculture or a duly designated official of the United States Department of Agriculture has authority to execute this

1 Compact on behalf of the United States Department of Agriculture pursuant to 7 U.S.C. 2201 note, Section 1(a);

2 NOW THEREFORE, the State of Montana and the United States agree as follows:

3 ARTICLE I

4 DEFINITIONS

5 For purposes of this Compact only the following definitions shall apply:

6 (1) "Abstracts" means the documents included in Appendix 1 of this Compact, entitled "Abstracts of Forest Service Federal Reserved Water Rights  
7 for Current Discrete Administrative Uses", referenced in this Compact as Appendix 1.

8 (2) "Concurrently" for the purposes of instream uses means not cumulative to the flow of other instream, nondiversionary water rights on the same  
9 reach of stream and for the purposes of in situ uses means not cumulative to the volume or flow of other in situ, nondiversionary water rights from the same  
10 source of water.

11 (3) "Department" means the Montana Department of Natural Resources and Conservation or its successor.

12 (4) "Discrete Administrative Use" means a federal reserved water right to divert or withdraw water from a source of supply for use authorized under  
13 the Organic Administrative Act, 16 U.S.C. 473, et seq., necessary to fulfill the primary purposes of a National Forest at administrative sites on National  
14 Forest System Lands and includes but is not limited to federal reserved water rights for the following purposes: water for district offices, ranger stations,  
15 guard stations, work centers, and housing; water used for facilities operated for administrative purposes; water used for permanently established tree  
16 nurseries and seed orchards; and water for maintaining riding and pack stock used for administrative purposes.

17 (5) "Dispersed Administrative Use" means a federal reserved water right to divert or withdraw water from time to time, as needed, from a source  
18 of supply for use authorized under the Organic Administrative Act, 16 U.S.C. 473, et seq., necessary to fulfill the primary purposes of a National Forest  
19 within a specified area on National Forest System Lands and includes but is not limited to federal reserved water rights for the following purposes: water  
20 for dust abatement and road construction; water for prescribed fire management; water for reclamation; water used to establish vegetation; water used  
21 temporarily for establishment of nursery stock and seed orchards; and water for other incidental administrative purposes.

(6) "Effective Date of This Compact" means the date of the ratification of the Compact by the Montana Legislature, written approval by the United States Department of Agriculture, or written approval by the United States Department of Justice, whichever is later.

(7) "In situ" means water with a surface expression used in the place of its natural occurrence and without need of a diversion structure, measured as a flow, level, or volume of water.

(8) "National Forest System Lands" means all lands within Montana that are owned by the United States and administered by the Secretary of Agriculture through the Forest Service, but does not include any lands within the exterior boundaries of National Forest System units that are not owned by the United States and administered by the Secretary of Agriculture through the Forest Service.

(9) "Parties" means the State and the United States.

(10) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, or any other entity, but does not include the United States.

(11) "South Fork Flathead Wild and Scenic River" means the segment of the South Fork of the Flathead River from its origin to Hungry Horse Reservoir located in Montana that, pursuant to the Wild and Scenic Rivers Act, 16 U.S.C. 1271, et seq., was designated as a component of the National Wild and Scenic Rivers System by Public Law 94-486, 16 U.S.C. 1274(a)(13), on October 12, 1976.

(12) "State" means the State of Montana and all officers, agents, departments, and political subdivisions thereof. Unless otherwise indicated, for purposes of notification or consent, "State" means the Director of the Montana Department of Natural Resources and Conservation or the Director's designee.

(13) "United States" means the United States of America and all officers, agencies, departments, and political subdivisions thereof. Unless otherwise indicated, for purposes of notification or consent other than service in litigation, "United States" means the Secretary of the Department of Agriculture or the Secretary's designee.

(14) "Water Right Recognized Under State Law" means a water right or use created and administered under Montana law and includes all Forest Service water rights created in Article V of this Compact and state water reservations granted, but does not include a federal or tribal reserved water right

1 recognized by the State.

2 (15) "Wetted Perimeter Methodology" means an instream flow methodology for fisheries flow based on habitat for food production in the shallow,  
3 fast-moving water of a stream. The wetted perimeter is the distance across the bottom and sides of a stream channel, measured at a riffle area, that is  
4 in contact with the water. A graph of the wetted perimeter versus discharge generally yields two inflection points. The upper inflection point of the graph  
5 is the level above which large increases in discharge result in a small increase of the wetted perimeter. The lower inflection point of the graph is the level  
6 below which small decreases in discharge result in large decreases of the wetted perimeter.

7 ARTICLE II

8 FEDERAL RESERVED WATER RIGHTS

9 The Parties agree that the following water rights are the federal reserved water rights of the United States for the National Forest System Lands.

10 A. **Discrete Administrative Uses on National Forest System Lands.**

11 The United States has federal reserved water rights for current and future Discrete Administrative Uses on National Forest System Lands, subject  
12 to the terms of Article III of this Compact:

13 1. **Current Discrete Administrative Uses on National Forest System Lands.**

14 The United States has federal reserved water rights for current Discrete Administrative Uses on National Forest System Lands as set forth in Table  
15 1 and the specific listing and Abstracts attached to this Compact as Appendix 1. In the event there is a discrepancy between Table 1 and an Abstract  
16 contained in Appendix 1, the Abstract in Appendix 1 controls.

17 2. **Future Discrete Administrative Uses on National Forest System Lands.**

18 The United States has federal reserved water rights for future Discrete Administrative Uses on National Forest System Lands as set forth in Table  
19 1.

20 B. **Dispersed Administrative Uses on National Forest System Lands.**

21 The United States has federal reserved water rights for Dispersed Administrative Uses on National Forest System Lands, subject to the terms of

1 Article III of this Compact, as set forth in Table 1. The period of use for Dispersed Administrative Uses on National Forest System Lands can be for any  
 2 period throughout the year.

**TABLE 1**

4	Discrete					Dispersed	
5	Administrative					Administrative	
6	Uses					Uses	
7	MT	Priority	National	Current	Future	Total	Volume
8	Adj	Date	Forests	(AF/YR)	(AF/YR)	(AF/YR)	(AF/YR)
9	Basin						
10	39E	1906-09-24	Custer	0.00	2.00	2.00	12.20
11	39F	1906-09-24	Custer	0.25	2.00	2.25	11.90
12	39FJ	1906-11-05	Custer	0.00	2.00	2.00	5.50
13	40A	1902-08-16	Lewis & Clark				90.00
14				1.36	2.00	3.36	
15		1906-08-10	Gallatin				3.30
16	40B	1906-11-05	Lewis & Clark	0.00	2.00	2.00	5.50
17	40C	1906-11-05	Lewis & Clark	0.00	2.00	2.00	2.70
18	41A	1906-11-05	Beaverhead-Deerlodge	2.13	2.13	4.26	121.00
19	41B	1906-11-05	Beaverhead-Deerlodge	1.26	2.00	3.26	42.90
20	41C	1906-11-05	Beaverhead-Deerlodge	8.90	8.90	17.80	70.90
21	41D	1906-11-05	Beaverhead-Deerlodge	202.27	49.27	251.54	310.60

1	41E	1906-04-12	Beaverhead-Deerlodge				85.50
2				0.00	2.00	2.00	
3		1905-05-12	Helena				1.20
4	41F	1902-08-16	Beaverhead-Deerlodge				98.50
5				14.62	14.62	29.24	
6		1902-08-16	Gallatin				69.50
7	41G	1906-04-12	Beaverhead-Deerlodge	2.50	2.50	5.00	81.80
8	41H	1906-03-07	Gallatin	14.63	14.63	29.26	147.60
9	41I	1905-10-03	Gallatin				15.40
10				4.75	4.75	9.50	
11		1905-10-03	Helena				169.30
12	41J	1905-10-03	Helena				36.00
13				5.51	5.51	11.02	
14		1906-11-06	Lewis & Clark				102.30
15	41K	1897-02-22	Lewis & Clark	6.63	6.63	13.26	44.80
16	41M	1897-02-22	Lewis & Clark	3.01	3.01	6.02	43.50
17	41O	1897-02-22	Lewis & Clark	3.75	3.75	7.50	24.40
18	41Q	1902-08-16	Lewis & Clark	0.33	2.00	2.33	72.10
19	41QJ	1906-11-06	Lewis & Clark				0.80
20				0.00	2.00	2.00	
21		1928-05-17	Helena				17.10

1	41R	1903-12-12	Lewis & Clark	0.00	2.00	2.00	9.50
2	41S	1902-08-16	Lewis & Clark	2.50	2.50	5.00	96.80
3	41U	1897-02-22	Lewis & Clark				11.20
4				0.01	2.00	2.01	
5		1928-05-17	Helena				14.40
6	42B	1907-03-02	Custer	0.00	2.00	2.00	13.10
7	42C	1907-03-02	Custer	39.35	39.35	78.70	133.70
8	42J	1907-03-02	Custer	0.00	2.00	2.00	11.20
9	43A	1906-08-10	Gallatin	1.51	2.00	3.51	43.40
10	43B	1902-09-04	Gallatin	14.33	14.33	28.66	136.10
11	43BJ	1902-09-04	Gallatin	9.64	9.64	19.28	22.50
12	43BV	1902-09-04	Gallatin	0.00	2.00	2.00	8.20
13	43C	1902-09-04	Custer	3.00	3.00	6.00	34.50
14	43D	1902-09-04	Gallatin				3.40
15				2.25	2.25	4.50	
16		1902-09-04	Custer				25.50
17	43N	1906-11-06	Custer	0.00	2.00	2.00	14.40
18	43P	1906-11-06	Custer	0.10	2.00	2.10	9.90
19	76B	1906-08-13	Kootenai	0.02	2.00	2.02	129.10
20	76C	1907-03-02	Kootenai	1.00	2.00	3.00	110.00
21	76D	1907-03-02	Kootenai	9.60	9.60	19.20	384.30



1	76E	1905-10-03	Beaverhead-Deerlodge				76.90
2				4.00	4.00	8.00	
3		1905-10-03	Lolo				52.10
4	76F	1928-05-17	Helena				65.90
5				19.40	19.40	38.80	
6		1906-11-06	Lolo				123.70
7	76G	1906-04-12	Beaverhead-Deerlodge				112.30
8				85.75	9.75	95.50	
9		1906-04-12	Helena				35.00
10		1905-10-03	Lolo				17.00
11	76GJ	1905-10-03	Beaverhead-Deerlodge	0.00	2.00	2.00	51.90
12	76H	1897-02-22	Bitterroot				280.20
13				96.82	75.00	171.82	
14		1897-02-22	Lolo				59.00
15	76I	1897-02-22	Flathead	0.02	2.00	2.02	22.30
16	76J	1897-02-22	Flathead	4,247.75	2.16	4,249.91	120.00
17	76K	1897-02-22	Flathead	241.51	241.51	483.02	97.10
18	76L	1907-03-02	Flathead				3.40
19				0.00	2.00	2.00	
20		1907-03-02	Lolo				8.50
21	76LJ	1907-03-02	Flathead				246.40

1				5.78	5.78	11.56	
2		1897-02-22	Kootenai				12.20
3	76M	1906-11-06	Lolo	1,000.28	335.28	1335.56	337.90
4	76N	1907-03-02	Kootenai				138.80
5				4.26	4.26	8.52	
6		1907-03-02	Lolo				168.40

**C. Emergency Fire Suppression.**

The use of water for emergency fire suppression benefits the public and is necessary for the primary purposes of the National Forest System Lands in Montana. The United States has a federal reserved water right to divert or withdraw water on National Forest System Lands, with the priority date for each Water Court basin set forth in Table 1 of this Compact, from a stream, lake, or pond, as needed for emergency fire suppression for the benefit of National Forest System Lands, and without a definition of the specific elements of a recordable water right, subject to the terms of Article III. Use of water for emergency fire suppression shall not be considered an exercise of the United States' federal reserved water rights for Discrete Administrative Uses as described in Article II, section A., or Dispersed Administrative Uses as described in Article II, section B.

**D. South Fork Flathead Wild and Scenic River.**

The United States has a federal reserved water right with a priority date of October 12, 1976, for instream flow on the South Fork Flathead Wild and Scenic River in the amount of the entire flow of the river, less any of the United States' Discrete Administrative Uses as described in Article II, section A., and Dispersed Administrative Uses as described in Article II, section B., provided that the instream flow water right is subordinate to all Water Rights Recognized Under State Law with a priority date before the Effective Date of This Compact. This federal reserved water right ends at the point where the South Fork Flathead Wild and Scenic River flows into Hungry Horse Reservoir.

**ARTICLE III**

**IMPLEMENTATION OF FEDERAL RESERVED WATER RIGHTS**

1           **A. Abstracts.**

2           Abstracts for all the United States' federal reserved water rights for Current Discrete Administrative Use on National Forest System Lands are set  
3 forth in Appendix 1. The Parties prepared the Abstracts to comply with the requirements for a final decree as set forth in 85-2-234, MCA, and in an effort  
4 to assist the state courts in the process of entering decrees accurately and comprehensively reflecting the rights for current Discrete Administrative Uses  
5 as described in this Compact. The rights specified in the Abstracts are subject to the terms of this Compact.

6           **B. Enforcement and Administration of Federal Reserved Water Rights.**

7           1. When a controversy arises between the United States' federal reserved water rights described by this Compact and another holder of a Water  
8 Right Recognized Under State Law or, for enforcement pursuant to Article VIII, section B., when there is a question concerning the use of water on National  
9 Forest System Lands under this Compact, the United States, the State, or a holder of a Water Right Recognized Under State Law may petition a court  
10 of competent jurisdiction for relief. Resolution of any controversy must be governed by the terms of this Compact when applicable or, to the extent not  
11 applicable, by appropriate federal or state law.

12           2. For the purpose of the administration of federal reserved water rights provided for in Article II, the United States agrees that a water  
13 commissioner or other official appointed by a court of competent jurisdiction may enter National Forest System Lands to collect data, inspect structures  
14 for the diversion and measurement of water, and distribute the federal reserved water rights in Article II. The terms of entry or distribution may be limited,  
15 as appropriate, by an order of a court of competent jurisdiction. Nothing in this Compact waives the right of the United States, with respect to a specific  
16 action or anticipated action by a water commissioner or other official under this subsection, to seek terms of entry or distribution consistent with federal  
17 law if in conflict with state law.

18           3. The Department may enter National Forest System Lands for which a federal reserved water right is described in Article II for the purposes  
19 of data collection on Forest Service water diversions or notice requirements by the United States, pursuant to Article III, section C.3., of this Compact.

20           **C. Use of Federal Reserved Water Rights.**

21           **1. Federal Reserved Water Rights.**

1 The rights of the United States described in Article II of this Compact are federal reserved water rights. Non-use of all or a part of the federal  
2 reserved water rights described in this Compact shall not constitute abandonment of the right.

3 **2. Development of Future Discrete Administrative Uses.**

4 The United States, without prior approval of the Department, may develop a Discrete Administrative Use after the Effective Date of This Compact  
5 as described in Article II, section A.2., provided that:

6 (a) the purpose of use of the water is for a Discrete Administrative Use as defined in Article I(4) and described in Article II, section A.2.;

7 (b) the quantity of water for Discrete Administrative Uses diverted or withdrawn shall not exceed the total amount as set forth in Article II, Table  
8 1; and

9 (c) the use shall not adversely affect a senior Water Right Recognized Under State Law.

10 **3. Use of Dispersed Administrative Uses.**

11 The United States, without prior approval of the Department, may use its federal reserved water right for Dispersed Administrative Uses, as needed,  
12 provided that:

13 (a) the purpose of use of the water is for a Dispersed Administrative Use as defined in Article I(5) and described in Article II, section B.;

14 (b) the total quantity of water for Dispersed Administrative Uses diverted or withdrawn shall not exceed the amount as set forth in Article II, Table  
15 1;

16 (c) the Forest Service shall provide notice of a Dispersed Administrative Use as follows:

17 (i) for uses of 20,000 gallons or less per day from a single source of supply, no notice is required;

18 (ii) for uses greater than 20,000 gallons per day and less than 60,000 gallons per day from a single source of supply, a notice must be posted  
19 at the site of the diversion or withdrawal for the entire period during which water is being diverted or withdrawn. The notice posted shall be clearly legible  
20 and visible and provide the following information:

21 (A) source of water;

- 1 (B) purpose of use;
- 2 (C) starting and ending date of diversion;
- 3 (D) place of use;
- 4 (E) diversion flow rate;
- 5 (F) maximum volume of water to be diverted or withdrawn per day; and
- 6 (G) name and contact information for the contractor, the local Forest Service Ranger District, and the local Department Water Resources Regional
- 7 Office.
- 8 (iii) for uses greater than 60,000 gallons per day from a single source of supply, the local Department Water Resources Regional Office must be
- 9 notified at least 10 days but not more than 45 days in advance of the initial use of the water. Notice must be posted at the site of the diversion or withdrawal,
- 10 as provided in Article III, section C.3.(c)(ii). Notification to the Department Water Resources Regional Office must provide the following information:
- 11 (A) source of water;
- 12 (B) legal description of the point of diversion or withdrawal;
- 13 (C) place of use;
- 14 (D) map showing preceding three items;
- 15 (E) purpose of use;
- 16 (F) starting and ending date of use;
- 17 (G) diversion flow rate;
- 18 (H) maximum volume of water to be diverted or withdrawn per day; and
- 19 (I) name and contact information for the contractor and the local Forest Service Ranger District.
- 20 (d) the diversion or withdrawal of water for a Dispersed Administrative Use shall not adversely affect a senior Water Right Recognized Under State
- 21 Law; and

(e) if notified that the diversion or withdrawal for a Dispersed Administrative Use is adversely affecting a senior Water Right Recognized Under State Law, the Forest Service will immediately cease diversion or withdrawal from that source of supply. To resume the diversion or withdrawal, the Forest Service can move the diversion or withdrawal to another source of supply or satisfy the senior user and the Department Water Resources Regional Office Manager that use will not adversely affect the senior user or users.

**D. Change in Use of Federal Reserved Water Rights.**

**1. Discrete Administrative Uses.**

The United States, without approval of the Department, may change a Discrete Administrative Use described in Article II, section A., provided that:

(a) the purpose of use of the water remains a Discrete Administrative Use as defined in Article I(4) and described in Article II, section A.;

(b) the quantity of water for Discrete Administrative Uses diverted or withdrawn shall not exceed the total amount as set forth in Article II, Table 1; and

(c) the change shall not adversely affect a Water Right Recognized Under State Law.

**2. Dispersed Administrative Uses.**

The United States' federal reserved water right to divert or withdraw water for Dispersed Administrative Uses as described in Article II, section B., shall not be changed to any other use.

**3. Emergency Fire Suppression.**

The United States' federal reserved water right to divert or withdraw water for Emergency Fire Suppression as described in Article II, section C., shall not be changed to any other use.

**4. South Fork Flathead Wild and Scenic River.**

The United States' federal reserved water right for instream flow for the South Fork Flathead Wild and Scenic River, as described in Article II, section D., shall not be changed to any other use.

**E. Reporting Requirements.**

1. The Forest Service agrees to provide a report to the Department on an annual basis or on a periodic basis agreed to by the Parties containing information on development of Discrete Administrative Uses, as described in Article III, section C.2., and any change of a Discrete Administrative Use, as described in Article III, section D.1.

2. Upon request by the Department, the Forest Service shall report to the Department information it has regarding water use for Emergency Fire Suppression, as described in Article II, section C.

3. For Dispersed Administrative Uses, as described in Article III, section C.3.(c)(ii) and (iii), upon request by the Department, the Forest Service shall provide copies of notice postings for the stream or basin requested.

4. For Dispersed Administrative Uses, as described in Article III, section C.3.(c)(i), upon request by the Department, the Forest Service shall report information it has available. In the event the Department requests additional information for future reports on a stream or basin for enforcement or water distribution purposes, the Forest Service agrees to comply with the request.

**F. Ownership Interest in Water for Purposes of Statewide Adjudication.**

The federal reserved water rights for Administrative Uses and Emergency Fire Suppression described in Article II, sections A., B., and C., are ownership interests in water and its use for each water source within National Forest System Lands that has been affected by a temporary preliminary decree or preliminary decree.

## ARTICLE IV

## STATE LAW PROVISIONS

### A. Compact Principles.

In order to promote settlement of issues between the United States and the State, the United States agrees to relinquish any and all claims to federal reserved water rights for instream flows on National Forest System Lands. The State agrees that, in consideration for the United States' agreement not to pursue federal reserved water rights for instream flows on National Forest System Lands, the following principles, subject to the terms of this Compact, shall be included in state law:

1           **1. Forest Service Water Rights Recognized Under Law Created in This Compact.**

2           There shall be created by this Compact Water Rights Recognized Under State Law held by the Forest Service as set forth in Article V, Table 2.

3           **2. State Water Reservation Process.**

4           (a) There shall be a state water reservation process providing a means for the United States to appropriate state-law-based water rights for a  
5           minimum instream flow, level, or quality of water that provides an opportunity for hearing and judicial review.

6           (i) Any appropriation granted under this process will result in a water right held by the United States that is protectable and enforceable under state  
7           law, and shall not be subject to periodic review or reallocation.

8           (ii) The date of appropriation for water rights granted under the state water reservation process will be the date of filing of the application for state  
9           water reservations and will be senior in priority to any applications for state water reservations filed after that date.

10          (b) The Parties agree that the language of 85-2-316, MCA, on the Effective Date of This Compact and the terms of Article VI of this Compact satisfy  
11          the principles in Article IV, section A.2.

12          **3. New State Water Reservation Section.**

13          The United States shall have the right to apply for a state water reservation under a new specific procedure in limited circumstances for state water  
14          reservations as set forth in Article VI, section B.

15          **4. Standing.**

16          In the ongoing statewide adjudication, the United States shall have the right to object to and participate as an objector to any water right claim for  
17          water use or storage on or water conveyed across National Forest System Lands. The Parties agree that the language of 85-2-233, MCA, on the Effective  
18          Date of This Compact satisfies the principles in Article IV, section A.4.

19          **B. State Law Adopted as a Condition Precedent to This Compact.**

20          Subject to Article VIII, section D., the Parties agree that as a condition precedent to this Compact, the following provisions will be adopted as state  
21          law:



## 1. Sequencing.

(a) The permitting process for water appropriations under state law and the permitting for the access and use of National Forest System Lands in relation to water appropriations will be sequenced to avoid conflict between state and federal permitting.

(b) The applicant is required to show proof of federal authorization before the application for a new appropriation of water or a change of appropriation will be correct and complete when:

(i) a state permit is required prior to a new appropriation of water, including ground water, or a change of appropriation; and

(ii) a federal authorization is required to occupy, use, or traverse National Forest System Lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water for the appropriation or change of appropriation.

(c) The state permit for a new appropriation shall be subject to any terms, conditions and limitations related to the use of water contained in the required federal authorization.

(d) The Parties agree that the language of 85-2-302, 85-2-310, 85-2-311, 85-2-312, and 85-2-402, MCA, on the Effective Date of This Compact satisfies this condition precedent.

## 2. Change of Diversionary Use to Instream Flow.

In addition to any other process available under state law, the Forest Service may apply for a change of use from an appropriation right to divert or withdraw water on land owned by the United States that is located within or immediately adjacent to the exterior boundaries of National Forest System Lands on the Effective Date of This Compact to an instream flow water right on National Forest System Lands within or immediately adjacent to the exterior boundaries of National Forest System Lands on the Effective Date of This Compact in accordance with procedures required under state law. The Parties agree that the language of [section 2] on the Effective Date of This Compact satisfies the principles in Article IV, section B.2.

## ARTICLE V

## WATER RIGHTS RECOGNIZED UNDER STATE LAW

There is created by this Compact appropriations of Water Rights Recognized Under State Law held by the Forest Service for instream flow or in

1 situ use as set forth in Article V.

2 **A. Water Rights Recognized Under State Law**

3 TABLE 2

4 Lower Stream Point

Upper Stream Point

5	Water		Flow								
6	Right		Rate							QTR	QTR
7	Number	Source	(CFS)	SEC	TWP	RGE	SEC	SEC	TWP	RGE	SEC
8	41F-30023850	Horse Creek	3.0	25	10S	01W	NESE	29	10S	01W	SWNW
9	41F-30023851	Sheep Creek	4.0	1	12S	02E	SWSE	20	12S	03E	SWNW
10	41H-30023852	East Fork Hyalite Creek	7.0	23	04S	06E	SWNW	12	05S	06E	SWSW
11	41H-30023853	Hyalite Creek	28.0	14	03S	05E	SESW	15	04S	06E	NWSW
12	41H-30023854	West Fork Hyalite Creek	12.0	26	04S	06E	NWNW	23	05S	06E	NW
13	41I-30023855	Beaver Creek	10.0	19	12N	02W	SWNE	11	12N	02W	SENE
14	41J-30023856	Sheep Creek	27.0	2	12N	05E	NWSW	5	12N	06E	SESE
15	41J-30023857	Tenderfoot Creek	15.0	30	14N	05E	NENE	22	14N	05E	NWSW
16	41S-30023858	Dry Wolf Creek	5.0	28	15N	10E	SWNW	31	15N	10E	SWSW
17	41S-30023859	South Fork Judith River	3.5	1	12N	11E	NENE	4	11N	11E	SENE
18	43B-30023860	Little Mission Creek	2.5	14	03S	11E	NENW	27	03S	11E	NWNE
19	43B-30023861	Pine Creek	4.0	8	04S	10E	NWSW	16	04S	10E	NWSW
20	43B-30023862	South Fork Deep Creek	7.0	5	04S	10E	NENW	14	04S	10E	NWNW
21	43B-30023863	Upper Deer Creek	2.0	13	02S	14E	NENW	29	03S	14E	SESE

1	76B-30023864	North Fork Yaak River	24.0	15	37N	31W	SWNE	4	37N	31W	NE
2	76B-30023865	Pete Creek	15.0	5	35N	32W	NENW	29	36N	32W	SWNW
3	76B-30023866	Seventeenmile Creek	40.0	27	34N	33W	NWSE	5	33N	32W	NWNW
4	76B-30023867	South Fork Yaak River	19.0	2	35N	32W	NENE	5	34N	31W	SWSW
5	76B-30023868	Spread Creek	50.0	3	35N	33W	SWSE	29	36N	33W	SENE
6	76B-30023869	West Fork Yaak River	30.0	32	37N	31W	NWNE	35	37N	32w	NENE
7	76C-30023870	East Fisher	15.0	31	26N	29W	NWNE	31	26N	29W	NENE
8	76C-30023871	Silver Butte/Fisher River	34.0	17	26N	29W	NENE	35	26N	30W	SENE
9	76C-30023872	West Fisher River	28.0	1	26N	30W	NWNW	4	26N	30W	SWSE
10	76D-30023873	Barron Creek	2.0	27	32N	29W	SWNW	21	32N	30W	NW
11	76D-30023874	Big Cherry Creek	40.0	27	29N	31W	SWSW	3	28N	31W	NENE
12	76D-30023875	Big Creek	19.0	3	34N	29W	NWNW	34	35N	30W	NWNW
13	76D-30023876	Bobtail Creek	5.0	20	31N	31W	NWSW	8	31N	31W	NESW
14	76D-30023877	Bristow Creek	12.0	14	32N	29W	NWNW	8	32N	29W	NESE
15	76D-30023878	Callahan Creek	60.0	24	31N	34W	NWNW	21	31N	34W	NWSE
16	76D-30023879	Canyon Creek	4.0	22	31N	29W	SWSE	29	31N	28W	SWSW
17	76D-30023880	Cripple Horse Creek	8.0	2	31N	29W	NESE	5	31N	28W	SWSW
18	76D-30023881	Five Mile Creek	4.0	17	32N	28W	SWNW	19	32N	27W	NENE
19	76D-30023882	Granite Creek	21.0	2	29N	31W	NWNW	5	29N	31W	NESE
20	76D-30023883	Libby Creek	40.0	16	28N	30W	NWNW	18	28N	30W	SESE
21	76D-30023884	Midas Creek	1.5	31	28N	30W	SWNW	8	27N	30W	SWSE

1	76D-30023885	North Fork Big Creek	14.0	28	35N	30W	SWSE	31	36N	30W	SWSE
2	76D-30023886	Parmenter Creek	10.0	7	30N	31W	SWNE	18	30N	32W	SWSW
3	76D-30023887	Quartz Creek	17.5	12	31N	32W	SESW	2	31N	32W	SWNE
4	76D-30023888	Ross Creek	20.0	8	28N	33W	NENE	17	28N	34W	SWNW
5	76D-30023889	South Fork Big Creek	20.0	33	35N	30W	SENE	5	32N	30W	NENE
6	76D-30023890	Therriault Creek	4.0	3	35N	26W	SWNW	3	35N	26W	SENW
7	76D-30023891	Young Creek	6.0	17	37N	28W	NESE	8	37N	29W	SE
8	76E-30023892	Middle Fork Rock Creek	41.0	18	04N	15W	NENE	25	04N	16W	NWSW
9	76E-30023893	Rock Creek at Bitterroot Flat	150.0	7	08N	17W	NWNW	7	07N	16W	SESE
10	76E-30023894	Rock Creek at Mouth	250.0	13	11N	17W	SENE	30	11N	16W	SWNW
11	76E-30023895	West Fork Rock Creek	12.0	35	06N	16W	NESE	2	05N	17W	NWSW
12	76F-30023896	Clearwater River at Lake Alva	13.0	24	18N	16W	SWSE	24	18N	16W	NWSE
13	76F-30023897	Copper Creek	11.0	26	15N	08W	SENE	9	15N	08W	NENE
14	76F-30023898	Morrell Creek	12.0	35	17N	15W	SWSE	1	17N	15W	NESE
15	76F-30023899	North Fork Blackfoot River	39.0	2	15N	11W	NWNW	27	16N	11W	NESE
16	76F-30023900	Placid Creek	7.0	13	16N	16W	SWSW	10	16N	16W	NWNW
17	76F-30023901	Poorman Creek	7.0	8	13N	08W	NWSW	24	13N	08W	SENE
18	76G-30023902	Little Blackfoot River	17.0	30	09N	06W	NENW	12	08N	07W	SWNE
19	76G-30023903	Schwartz Creek	10.0	4	11N	17W	NWNW	8	11N	17W	SESW
20	76H-30023904	Lolo Creek	41.0	29	12N	22W	NENE	25	12N	23W	NENW
21	76H-30023905	South Fork Lolo Creek	15.0	6	11N	21W	NWNW	7	11N	21W	NWNW

1	76J-30023906	Wounded Buck Creek	11.0	17	29N	18W	SWNW	30	29N	18W	SWSW
2	76K-30023907	Bond Creek	6.0	24	25N	18W	NWNW	17	25N	17W	NWSE
3	76K-30023908	Cedar Creek	7.0	12	22N	18W	NENW	21	22N	18W	SESE
4	76K-30023909	Cold Creek	22.0	28	21N	17W	SWNE	33	21N	18W	NENW
5	76K-30023910	Elk Creek	25.0	16	20N	17W	NENE	23	20N	18W	SENW
6	76K-30023911	Goat Creek	11.0	17	23N	17W	NWSW	12	23N	17W	NWNE
7	76K-30023912	Groom Creek	2.5	12	25N	18W	SWSW	5	25N	17W	SE
8	76K-30023913	Hall Creek	2.5	11	25N	18W	SENE	11	25N	18W	NENE
9	76K-30023914	Lion Creek	19.0	8	22N	17W	SWNE	10	22N	16W	NWSW
10	76K-30023916	North Fork Lost Creek	6.0	27	25N	17W	NWSE	5	24N	16W	NESE
11	76K-30023917	Piper Creek	9.0	8	22N	17W	SWSW	33	22N	18W	NENW
12	76K-30023918	Scout Creek	1.5	12	23N	17W	NWNE	19	23N	16W	SESE
13	76K-30023919	South Fork Lost Creek	6.0	6	24N	16W	SWSW	19	24N	16W	NWSE
14	76LJ-30023920	Red Meadow Creek	16.0	7	35N	21W	SWNW	11	35N	22W	NWNW
15	76LJ-30023921	Trail Creek	37.0	34	37N	22W	SESE	28	37N	22W	SESW
16	76M-30023922	Rattlesnake Creek	17.0	2	13N	19W	NWNE	14	14N	18W	NENW
17	76M-30023923	Trout Creek	28.0	23	16N	26W	SWSW	5	15N	26W	NESW
18	76N-30023924	Bull River	29.0	14	28N	33W	NWNW	14	28N	33W	NENW
19	76N-30023925	Graves Creek	28.0	36	23N	30W	SWSW	36	23N	30W	NWNE
20	76N-30023926	Trout Creek	14.0	24	24N	32W	NENE	28	24N	32W	SWSW
21	76N-30023927	Vermilion River	110.0	14	24N	31W	SWSE	7	24N	30W	NWSW

1	Water Right		Volume		QTR		
2	Number	Source	(AF/YR)	SEC	TWP	RGE	SEC
3	76M-30023928	Shoofly Meadow	50.75	4	14N	17W	SW

4        **B. Priority Date.**

5        The priority date of each of the Forest Service Water Rights Recognized Under State Law created in Article V, section A., is the Effective Date  
6 of This Compact.

7        **C. Purpose of Use.**

8        Except for Water Right Number 76M-30023928, the purpose of use of each of the Forest Service Water Rights Recognized Under State Law  
9 created in Article V, section A., is fishery. The purpose of use for Water Right Number 76M-30023928, created in Article V, section A., is wildlife, which  
10 includes habitat.

11       **D. Period of Use.**

12       The period of use of each of the Forest Service Water Rights Recognized Under State Law created in Article V, section A., is January 1 to  
13 December 31.

14       **E. Limitation on Objections to Changes.**

15       A Forest Service Water Right Recognized Under State Law created in Article V, section A., shall not be the basis to preclude a change in point  
16 of diversion, means of diversion, or place of use of a senior, direct-from-source, stock water right within an allotment on National Forest System Lands  
17 if the change is for dispersing stock in the allotment and the proposed change does not expand historic consumptive use of the stock water right.

18       **F. Administration and Enforcement.**

19       The Forest Service Water Rights Recognized Under State Law created in Article V, section A., are appropriations under state law and, as such,  
20 will be administered by the State and enforced in accordance with state law. The United States, as owner and user of these water rights, is entitled to the  
21 same benefits and is subject to the same regulations as all other holders of a Water Right Recognized Under State Law.

### G. Concurrent With Other Instream Flow Uses.

The Forest Service Water Rights Recognized Under State Law created in Article V, section A., are for instream uses or in situ nonconsumptive use, meaning that there is no diversion, impoundment, or withdrawal associated with the use and the use does not cause a net loss of water in the source of supply. The Forest Service Water Rights Recognized Under State Law created in Article V, section A., shall run Concurrently with other instream flow or in situ rights.

## ARTICLE VI

## APPLICATIONS FOR STATE WATER RESERVATIONS UNDER STATE LAW

**A. State Water Reservation.**

The Forest Service may apply for a state water reservation to maintain a minimum flow, volume, level, or quality of water on National Forest System Lands under 85-2-316, MCA, in all basins within the State including basins or subbasins closed to new appropriations on or after the Effective Date of This Compact, subject to the terms of this Compact, for any purpose authorized by federal law applicable to National Forest System Lands. Any purpose authorized by federal law applicable to National Forest System Lands shall be considered a beneficial use under state law for the purposes of this Compact but shall set no precedent as to whether such purposes are beneficial uses under state law outside the terms of this Compact. A state water reservation issued under 85-2-316, MCA, is a Water Right Recognized Under State Law.

### B. Specific Procedure in Limited Circumstances.

1. (a) For a state water reservation application pursuant to Article VI, section A., when the purpose of the reservation is to maintain a minimum flow for fish and the amount requested is based on the Wetted Perimeter Methodology or other methodology adopted pursuant to Article VI, section B.1.(b), a correct and complete application shall constitute:

- (i) conclusive evidence of the purpose of the reservation;
- (ii) conclusive evidence of the need for the reservation;
- (iii) prima facie evidence that the amount requested is accurate and suitable;

1 (A) at the lower inflection point of the Wetted Perimeter Methodology; or

2 (B) at the upper inflection point of the Wetted Perimeter Methodology or other methodology adopted pursuant to Article VI, section B.1.(b), when  
3 the purpose of the reservation is for an existing population of bull trout, westslope cutthroat trout, Yellowstone cutthroat trout, Columbia River redband trout,  
4 arctic grayling, or any other fish species listed in the future under the Endangered Species Act of 1973, 16 U.S.C. 1531, et seq.; and

5 (iv) prima facie evidence that the reservation is in the public interest.

6 (b) By mutual agreement of the Parties, the Department may propose an administrative rule under the Montana Administrative Procedure Act,  
7 Title 2, chapter 4, of the Montana Code Annotated, to establish a methodology, other than the Wetted Perimeter Methodology, for an application for a state  
8 water reservation to maintain a minimum flow under Article VI, section B.1.(a), for fish species identified in Article VI, section B.1.(a)(iii)(B). Rulemaking  
9 under this subsection shall not be considered a modification of this Compact. The Department may adopt a rule under this subsection only if it finds, based  
10 on scientific and technical evidence in the administrative record, that:

11 (i) the proposed methodology enjoys acceptance in the scientific community as a methodology for establishment of minimum flow for pertinent  
12 fish species based on evidence that includes the existence of peer-reviewed studies, testimony or publications by experts in the field, and previous use  
13 in Montana or another relevant location; and

14 (ii) the results of the proposed methodology with respect to the stream that is the subject of the application are either based on field data collected  
15 with respect to the stream or susceptible to verification based on field data.

16 2. For purposes of Article VI, section B., a correct and complete application shall be substantially in the form attached to this Compact as Appendix  
17 3. Appendix 3 may be modified at any time by the consent of both Parties and shall not be considered a modification of the Compact.

18 3. For the purposes of Article VI, section B., the Department shall issue a state water reservation unless an objector proves by a preponderance  
19 of the evidence that:

20 (a) the amount of water under the Wetted Perimeter Methodology or other methodology adopted pursuant to Article VI, section B.1.(b), was not  
21 accurately measured or calculated, that the Wetted Perimeter Methodology or other methodology adopted pursuant to Article VI, section B.1.(b), could



1 not suitably be applied to the stream reach applied for, or that there is not an existing population of the fish species set forth in Article VI, section  
2 B.1.(a)(iii)(B), identified in the application for state water reservation in the stream reach applied for; or

3 (b) for the public interest, there is a projected water development project:

4 (i) that is feasible;

5 (ii) that is reliably projected to be commenced within ten (10) years or within ten (10) years after a basin closure is removed;

6 (iii) in which the objector has or can reasonably obtain a possessory interest or the written consent of the Person or Party with the possessory  
7 interest in the property where the water is to be diverted, impounded, stored, transported, and put to beneficial use;

8 (iv) for which the amount of water needed for the project is reasonable;

9 (v) for which water needed for the project is not reasonably available from any other water source;

10 (vi) for which the water needed for the project, based on amount and period of use, would be unavailable if the proposed reservation was granted;

11 (vii) that would not be feasible with water either in a lesser amount or at a different location if the reservation was granted; and

12 (viii) that serves a significant public need.

13 4. If the Department determines that proofs under Article VI, section B.3.(a), are met or that proofs for all criteria under Article VI, section B.3.(b),  
14 are met, the Department may issue, modify, or deny the reservation or may subordinate the reservation to the actual development of the project identified  
15 in Article VI, section B.3.(b).

16 **C. General Provisions.**

17 1. The Forest Service's ability to apply for a state water reservation pursuant to Article VI in any basin or subbasin terminates thirty (30) years  
18 after the state court issues a final decree for that water basin under 85-2-234(1), MCA, or thirty (30) years after the Effective Date of This Compact,  
19 whichever is later. The termination of the Forest Service's ability to apply for a state water reservation pursuant to Article VI under this subsection shall  
20 not restrict the Forest Service's ability to apply for a water right in any process available to the Forest Service under state law, including 85-2-316, MCA,  
21 provided that, the terms of this Compact shall not apply.

1           2. A state water reservation issued to the Forest Service under Article VI shall not be the basis to preclude a change in point of diversion, means  
2 of diversion, or place of use of a senior, direct-from-source, stock water right within an allotment on National Forest System Lands if the change is for  
3 dispersing stock in the allotment and the proposed change does not expand historic consumptive use of the stock water right.

4           3. In any contested case proceeding held under the Montana Administrative Procedure Act, Title 2, chapter 4, of the Montana Code Annotated,  
5 pursuant to this Compact, the common law and statutory rules of evidence shall apply only upon stipulation of all entities who are involved in a proceeding.

6           4. Any appeal of an administrative decision under Article VI shall be in state court and shall be filed at the First Judicial District in Helena, and the  
7 review shall be conducted according to the procedures for judicial review of contested cases under the Montana Administrative Procedure Act, Title 2,  
8 chapter 4, of the Montana Code Annotated.

9           5. A state water reservation issued to the Forest Service pursuant to Article VI is not subject to periodic review by the Department as set forth in  
10 85-2-316(10), MCA. A state water reservation issued to the Forest Service pursuant to Article VI shall not be reallocated to another qualified reservant  
11 with a retained priority date as set forth in 85-2-316(11), MCA. Unless provided in this Compact, all other provisions of state law apply to a state water  
12 reservation issued to the Forest Service.

13           **D. Administration and Enforcement.**

14           Any state water reservation issued pursuant to Article VI is a Water Right Recognized Under State Law and, as such, will be administered by the  
15 State and enforced in accordance with state law. The United States, as owner and user of these water rights, is entitled to the same benefits and is subject  
16 to the same regulations of water use as all other holders of a Water Right Recognized Under State Law.

17           **E. Concurrent With Other Instream Flow Uses.**

18           Any state water reservation issued pursuant to Article VI is a Water Right Recognized Under State Law for instream uses or in situ nonconsumptive  
19 uses, meaning that there is no diversion, impoundment, or withdrawal associated with the use and the use does not cause a net loss of water in the source  
20 of supply. Unless otherwise provided in the terms and conditions, a state water reservation issued pursuant to Article VI shall run Concurrently with other  
21 instream flow rights.

#### F. Department Reporting to Montana Legislature.

For the period of time set forth in Article VI, section C.1., the Department shall biennially report to the Environmental Quality Council or other appropriate legislative committee the state water reservations applied for by the Forest Service since the previous report and the Department action on applications for state water reservations by the Forest Service since the previous report.

## ARTICLE VII

## GENERAL PROVISIONS

**A. No Effect on Tribal Rights or Other Federal Reserved Water Rights.**

1. The relationship between the water rights of the Forest Service described in this Compact and any rights to water of an Indian tribe in Montana or of any federally derived water right of an individual or of the United States on behalf of such tribe or individual shall be determined by the rule of priority. The Parties to this agreement recognize that the water rights described in This Compact are junior to any tribal water rights with a priority date before the Effective Date of This Compact, including aboriginal rights, if any, in the basins affected.

2. Nothing in this Compact may be construed or interpreted in any manner to establish the nature, extent, or manner of administration of the rights to water of any other federal agency or federal lands in Montana other than National Forest System Lands.

3. Nothing in this Compact may be construed or interpreted in any manner to establish the nature, extent, or manner of administration of the rights to water of any Indian tribes and tribal members in Montana.

4. Nothing in this Compact is otherwise intended to conflict with or abrogate a right or claim of any Indian tribe regarding boundaries or property interests in the State of Montana.

## B. General Disclaimers.

Nothing in this Compact may be construed or interpreted:

1. as a precedent for the litigation of federal reserved water rights or the interpretation or administration of future compacts between the United States and the State or between the United States and any other state;

2. as a waiver by the United States of its right under state law to raise objections in state court to individual water rights claimed pursuant to state law on National Forest System Land in the basins affected by this Compact or any right to raise objections in an appropriate forum to individual water rights subject to a provisional permit under state law in the basins affected by this Compact;

3. to establish a precedent for other agreements between the State and the United States or an Indian tribe;

4. to determine the relative rights, interest, of Persons using water under the authority of state law or to limit the rights of the Parties or a Person to litigate an issue not resolved by this Compact;

5. to create or deny substantive rights through headings or captions used in this Compact;

6. to expand or restrict any waiver of sovereign immunity existing pursuant to federal law as of the Effective Date of This Compact;

7. with respect to federal reserved water rights, to affect the right of the State to seek fees or reimbursement for costs or the right of the United States to contest the imposition of such fees or costs pursuant to a ruling by a court of competent jurisdiction or Act of Congress;

8. to affect in any manner the entitlement to or quantification of other federal water rights. This Compact is only binding on the United States with regard to the water rights of the Forest Service and does not affect the water rights of any other federal agency that is not a successor in interest to the water rights subject to this Compact;

9. to prevent the United States from seeking a permit to appropriate water under state law from a source not closed to new permits by law; or

10. to expand or restrict rights of the United States under federal law except as expressly provided in this Compact.

**C. Reservation of Rights.**

The Parties expressly reserve all rights not granted, described, or relinquished in this Compact.

**D. Severability.**

Except as provided in Article VIII, section C., the provisions of this Compact are not severable.

**E. Multiple Originals.**

This Compact is executed in quintuplicate. Each of the five (5) Compacts bearing original signatures shall be deemed an original.

Unless otherwise specifically provided for in this Compact, service of notice required under this Compact, except service in litigation, shall be:

2. United States: Upon the Secretary of Agriculture or other officials that the Secretary may designate in writing.

## FINALITY OF COMPACT AND DISMISSAL OF CLAIMS

1. The Effective Date of This Compact is the date of the ratification of this Compact by the Montana Legislature, written approval by the United States Department of Agriculture, or written approval by the United States Department of Justice, whichever occurs later. Subject to Article VIII, section 1, when effective, all of the provisions of this Compact shall be binding on:

(b) except as otherwise provided in Article VII, section A., the United States and a Person or entity of any nature whatsoever using, claiming, or manner asserting a right under the authority of the United States to the use of water.

2. Following the Effective Date of This Compact, this Compact shall not be modified without the consent of both Parties. Unilateral substantive modification of the terms of this Compact by either Party, as determined by a court of competent jurisdiction, shall render this Compact voidable at the option of the other Party.

3. On approval of this Compact by a court of competent jurisdiction and entry of a decree by such court confirming the rights described in this Compact, this Compact and such rights are binding on all Persons bound by the final order of the court.

4. If an objection to this Compact is sustained under 85-2-233, MCA, this Compact shall be voidable by action of and without prejudice to either

1           **B. Enforcement of Compact.**

2           1. Either Party may seek enforcement of the terms of this Compact in a court of competent jurisdiction, subject to the limitations of remedies  
3 provided in Article VIII, section C.

4           2. When the enforcement action involves issues of notice or reporting required under Article III, sections C.3.(c) and E., the State shall provide  
5 written notice to the Forest Service and allow a reasonable opportunity to resolve the issue prior to filing an enforcement action.

6           3. Except as provided in Article VIII, section C., the remedy for an action for enforcement of the terms of this Compact shall not include termination  
7 of the Compact in whole or in part.

8           **C. Exclusive Remedy for Changes in State Law.**

9           1. For the time period set forth in subsection 11, if the State enacts a law that results in an alleged material impairment of any principle set forth  
10 in Article IV, section A.2., A.3., or A.4., the United States may, within 90 days of the effective date of the law, provide notice to the State of the alleged  
11 material impairment. If the United States fails to provide notice within 90 days of the effective date of the law, the United States is barred from taking any  
12 action under this section regarding alleged material impairment by enactment of the law.

13           2. Following the receipt of notice provided in subsection 1, the Parties shall meet within 30 days to discuss the alleged material impairment. The  
14 Parties may each appoint a negotiator and may utilize a neutral third party to discuss resolution of the alleged material impairment.

15           3. If the State does not agree that the legislation has resulted in material impairment within 90 days or such time as the Parties may agree or if  
16 no other alternative resolution has been found, the United States may seek a judgment in a court of competent jurisdiction declaring that the specified act  
17 of the Montana Legislature has resulted in material impairment of a principle set forth in Article IV, section A.2., A.3., or A.4. The only remedy available  
18 under this subsection is a declaratory judgment as to whether or not the change in state law results in a material impairment of a principle set for in Article  
19 IV, section A.2., A.3., or A.4. The Parties shall jointly request the court to retain jurisdiction through all proceedings under this section.

20           4. If the State agrees or if a court finds that changes to state law have materially impaired a principle set forth in Article IV, section A.2., A.3., or  
21 A.4., the United States may take no action under subsection 5 until the final adjournment of the next regular session of the Montana Legislature. If the

1 material impairment is cured through enacted legislation to the satisfaction of the United States, the United States is barred from taking further action under  
2 this section.

3 5. If, in the opinion of the United States, the State has failed to enact legislation that cures a material impairment as provided in subsection 4, the  
4 United States may initiate severance and termination of portions of the Compact as provided in subsection 8 by sending notice to the State within 90 days  
5 from the end of the regularly scheduled legislative session. If this notice is not served within the 90-day period, the United States is barred from severing  
6 and terminating portions of the Compact based on material impairment.

7 6. If the State has enacted a law to cure the material impairment and the United States does not agree that the material impairment has been cured  
8 by the enactment, the State shall have the opportunity within 90 days from receipt of the notice served by the United States to seek a judgment declaring  
9 that the specific enactment has cured the material impairment of a principle set forth in Article IV, section A.2., A.3., or A.4., either by:

10 (a) invoking any retained jurisdiction of the court; or

11 (b) if no court has retained jurisdiction over the dispute, seeking a judgment in a court of competent jurisdiction.

12 7. If the State does not file an action within the 90-day period provided in subsection 6, the notice served by the United States becomes effective  
13 at the expiration of the 90-day period. If the State files for declaratory judgment and the court finds that legislation enacted by the State cures the material  
14 impairment, then the notice served by the United States does not operate to sever or terminate portions of the Compact under subsection 8. If the court  
15 finds that the enacted legislation does not cure the material impairment, the notice served by the United States becomes effective when the court's judgment  
16 becomes final either through the exhaustion of all available appeals or the running of the time for taking an appeal.

17 8. If the United States elects to sever and terminate portions of the Compact under this section, the Parties agree that Article IV, section A.2., A.3.,  
18 and A.4., and Article VI together and in their entirety are severed from the Compact and all rights and obligations under those provisions are terminated.  
19 All other provisions of this Compact remain in force and effect. If the portions of the Compact are severed and terminated, the Parties agree that the United  
20 States shall retain all water rights contained in Articles II and V and state water reservations granted to the United States prior to severance and termination  
21 under this subsection.

1           9. If the United States severs and terminates portions of the Compact as provided in subsection 8, the United States may file federal reserved  
2 water right claims in the state general stream adjudication, in the Montana Water Court or other state court that succeeds to the Montana Water Court's  
3 jurisdiction to conduct the general stream adjudication, for instream flow for any stream on which the United States has not been granted a Water Right  
4 Recognized Under State Law for an instream flow or an in situ right. The United States shall file all federal reserved water right claims for instream flow  
5 with the state court within twelve (12) months after severance and termination of portions of the Compact become effective. The United States agrees that,  
6 regardless of the dates of the reservation of the National Forest System Lands for which a federal reserved water right is claimed, the priority date of the  
7 federal reserved water right claim will be the Effective Date of This Compact.

8           10. The remedy provided in Article VIII, section C., is the exclusive remedy for actions brought as a result of changes to state law that materially  
9 impair the provisions of Article IV, section A.2., A.3., or A.4. There is no remedy under this Compact for changes to state law except as applied under this  
10 section to Article IV, section A.2., A.3., and A.4., and as provided in Article VIII, section A.2.

11           11. This section and the procedure and remedy provided under this section shall remain in effect for a period of thirty (30) years after the state  
12 court issues a final decree for all water basins under 85-2-234(1), MCA, that contain National Forest System Lands. This period of time under this  
13 subsection is tolled for any period of time during which state law materially impaired the interest of the United States as agreed to by the State or  
14 determined by a court of competent jurisdiction. After this period, all rights and remedies under this section terminate.

15           **D. Limits on Article IV, Section B.**

16           Article IV, section B., is not an enforceable term of this Compact, and changes to the provisions of state law as described in Article IV, sections  
17 B.1. and B.2., after the Effective Date of This Compact shall not give rise to any cause of action in law or in equity or provide any remedy under this  
18 Compact.

19           **E. State Court Filing.**

20           Subject to the following stipulations and within one hundred eighty (180) days of the Effective Date of This Compact, the Parties shall submit this  
21 Compact to an appropriate state court having jurisdiction over this matter in an action commenced pursuant to 43 U.S.C. 666, for approval in accordance



1 with state law and for the incorporation of the federal reserved water rights described in this Compact into a decree or decrees entered in the court. The  
2 Parties understand and agree that the submission of this Compact to a state court, as provided for in this Compact, does not expand or restrict the  
3 jurisdiction of the state court or expand or restrict in any manner the waiver of sovereign immunity of the United States in the McCarran Amendment, 43  
4 U.S.C. 666, or other provision of federal law.

5 **F. Dismissal of Filed Claims.**

6 At the time the state courts approve the federal reserved water rights described in Article II of this Compact and enter a decree or decrees  
7 confirming the rights described, such courts shall dismiss, with prejudice, all of the water right claims specified in Appendix 2 of this Compact for National  
8 Forest Service Lands. If this Compact fails approval or a federal reserved water right described in this Compact is not confirmed, the specified claims shall  
9 not be dismissed.

10 **G. Consent Decree.**

11 This Compact may be filed as a consent decree in federal court if it is finally determined in a judgment binding on the State of Montana that the  
12 state courts lack jurisdiction over some or all of the water rights described in this Compact. Within one (1) year of such judgment, the United States agrees  
13 to commence such proceedings in the federal district court for the District of Montana as may be necessary to judicially confirm the water rights described  
14 in this Compact.

15 **H. Settlement of Claims.**

16 The Parties intend that the water rights described in this Compact, together with the rights and obligations set forth in Article IV, are in full and final  
17 settlement of all federal reserved water right claims filed by the United States or that could have been filed by the United States as of the Effective Date  
18 of This Compact for the primary purposes of the National Forest System Lands in the State of Montana. Pursuant to this settlement, the United States  
19 hereby relinquishes forever on the Effective Date of This Compact all said federal reserved water right claims.

20 **I. Defense of Compact.**

21 The Parties agree to defend the provisions and purposes of this Compact from all challenges and attacks.

1 IN WITNESS WHEREOF the representatives of the State of Montana and the United States have signed this Compact on the \_\_\_\_ day of \_\_\_\_\_,  
2 2007.

3  
4 **NEW SECTION. Section 2. Change in appropriation right authorization for instream flow -- United States department of agriculture, forest**

5 **service.** (1) (a) The department shall accept and process an application by the United States department of agriculture, forest service for a change in  
6 appropriation right under the provisions of 85-2-402 and this section to protect, maintain, or enhance streamflows to benefit the fishery or other resources  
7 on national forest system lands.

8 (b) As used in this section, "national forest system lands" has the same meaning as that provided in [section 1, Article I].

9 (c) To change an appropriation right, the United States department of agriculture, forest service must own the appropriation right that it seeks to  
10 change to an instream flow right, the diversion or withdrawal that is to be changed to instream flow must be located within or immediately adjacent to the  
11 exterior boundaries of national forest system lands on the date provided in [section 1, Article IV.B.2.], and the stream reach in which the streamflow is to  
12 be protected, maintained, or enhanced must be located within or immediately adjacent to the exterior boundaries of national forest system lands as of the  
13 date provided in [section 1, Article IV.B.2.]. The application for a change in appropriation right must:

14 (i) include specific information on the length and location of the stream reach in which the streamflow is to be protected, maintained, or enhanced;  
15 and

16 (ii) provide a detailed streamflow measuring plan that describes the point where and the manner in which the streamflow must be measured.

17 (2) In addition to the requirements of 85-2-402, when applying for a change in appropriation right pursuant to this section, the United States  
18 department of agriculture, forest service, shall prove by a preponderance of the evidence that:

19 (a) the change in appropriation right authorization to protect, maintain, or enhance streamflows to benefit the fishery or other resources, as  
20 measured at a specific point, will not adversely affect the water rights of other persons; and

21 (b) the amount of water for the proposed instream flow use is needed to protect, maintain, or enhance streamflows to benefit the fishery or other

1 resources.

2 (3) The proposed method of measurement of the water to protect, maintain, or enhance streamflows to benefit the fishery or other resources must  
3 be approved by the department before a change in appropriation right may be approved.

4 (4) The department is not responsible for costs associated with installing devices or providing personnel to measure streamflows according to  
5 the measurement plan submitted under this section.

6 (5) If an appropriation right is changed pursuant to this section, the priority of the appropriation right remains the same as the appropriation right  
7 that was changed.

8 (6) A change in appropriation right authorization under this section does not create a right of access across private property or allow any  
9 infringement of private property rights.

10 (7) The maximum quantity of water that may be subject to a change in appropriation right authorization to protect, maintain, or enhance  
11 streamflows to benefit the fishery or other resources is the amount historically diverted. However, only the amount historically consumed or a smaller  
12 amount if specified by the department in the change in appropriation right authorization may be used to protect, maintain, or enhance streamflows to benefit  
13 the fishery or other resources below the existing point of diversion.

14 (8) The department may modify or revoke the change in appropriation right up to 10 years after it is approved if an appropriator with a priority of  
15 appropriation that is earlier than the change in appropriation right that was granted submits new evidence that was not available at the time the change  
16 in appropriation right was approved that proves by a preponderance of evidence that the appropriator's water right is adversely affected.

17

18 **Section 3.** Section 85-2-102, MCA, is amended to read:

19 **"85-2-102. (Temporary) Definitions.** Unless the context requires otherwise, in this chapter, the following definitions apply:

20 (1) "Appropriate" means:

21 (a) to divert, impound, or withdraw, including by stock for stock water, a quantity of water for a beneficial use;

1 (b) in the case of a public agency, to reserve water in accordance with 85-2-316;

2 (c) in the case of the department of fish, wildlife, and parks, to lease water in accordance with 85-2-436;

3 (d) in the case of the United States department of agriculture, forest service.:

4 (i) instream flows and in situ use of water created in [section 1, Article V]; or

5 (ii) to change an appropriation right to divert or withdraw water under subsection (1)(a) to instream flow to protect, maintain, or enhance streamflows  
6 in accordance with [section 2]; or

7 ~~(d)~~(e) temporary changes or leases for instream flow to maintain or enhance instream flow to benefit the fishery resource in accordance with  
8 85-2-408.

9 (2) "Beneficial use", unless otherwise provided, means:

10 (a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water),  
11 domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses;

12 (b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease  
13 issued by the department under 85-2-141;

14 (c) a use of water by the department of fish, wildlife, and parks pursuant to a lease authorized under 85-2-436; or

15 (d) a use of water through a temporary change in appropriation right or lease to enhance instream flow to benefit the fishery resource in  
16 accordance with 85-2-408.

17 (3) "Certificate" means a certificate of water right issued by the department.

18 (4) "Change in appropriation right" means a change in the place of diversion, the place of use, the purpose of use, or the place of storage.

19 (5) "Commission" means the fish, wildlife, and parks commission provided for in 2-15-3402.

20 (6) "Correct and complete" means that the information required to be submitted conforms to the standard of substantial credible information and  
21 that all of the necessary parts of the form requiring the information have been filled in with the required information.

(7) "Declaration" means the declaration of an existing right filed with the department under section 8, Chapter 452, Laws of 1973.

(8) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

(9) "Developed spring" means any artificial opening or excavation in the ground, however made, including any physical alteration at the point of discharge regardless of whether it results in any increase in the yield of ground water, from which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn.

(10) "Existing right" or "existing water right" means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law.

(11) "Ground water" means any water that is beneath the ground surface.

(12) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive presumption of abandonment under 85-2-226.

(13) "Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

(14) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency of the United States, or any other entity.

(15) "Political subdivision" means any county, incorporated city or town, public corporation, or district created pursuant to state law or other public body of the state empowered to appropriate water. The term does not mean a private corporation, association, or group.

(16) "Salvage" means to make water available for beneficial use from an existing valid appropriation through application of water-saving methods.

(17) "State water reservation" means a water right created under state law after July 1, 1973, that reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of water throughout the year or at periods or for defined lengths of time.

(18) "Substantial credible information" means probable, believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested by the person providing the information.

(19) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

(20) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

(21) "Water division" means a drainage basin as defined in 3-7-102.

(22) "Water judge" means a judge as provided for in Title 3, chapter 7.

(23) "Water master" means a master as provided for in Title 3, chapter 7.

(24) "Watercourse" means any naturally occurring stream or river from which water is diverted for beneficial uses. It does not include ditches, culverts, or other constructed waterways.

(25) "Well" means any artificial opening or excavation in the ground, however made, by which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn. (Terminates June 30, 2009--sec. 9, Ch. 123, L. 1999.)

**85-2-102. (Effective July 1, 2009) Definitions.** Unless the context requires otherwise, in this chapter, the following definitions apply:

(1) "Appropriate" means:

(a) to divert, impound, or withdraw, including by stock for stock water, a quantity of water for a beneficial use;

(b) in the case of a public agency, to reserve water in accordance with 85-2-316;

(c) in the case of the United States department of agriculture, forest service,;

(i) instream flows or in situ use of water created in [section 1, Article V]; or

(ii) to change an appropriation right to divert or withdraw water under subsection (1)(a) to instream flow to protect, maintain, or enhance streamflows in accordance with [section 2]; or

~~(e)~~(d) temporary changes or leases for instream flow to maintain or enhance instream flow to benefit the fishery resource in accordance with 85-2-408.

(2) "Beneficial use", unless otherwise provided, means:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water),

- 1 domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses;
- 2 (b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease
- 3 issued by the department under 85-2-141; or
- 4 (c) a use of water through a temporary change in appropriation right or lease to enhance instream flow to benefit the fishery resource in accordance
- 5 with 85-2-408.
- 6 (3) "Certificate" means a certificate of water right issued by the department.
- 7 (4) "Change in appropriation right" means a change in the place of diversion, the place of use, the purpose of use, or the place of storage.
- 8 (5) "Correct and complete" means that the information required to be submitted conforms to the standard of substantial credible information and
- 9 that all of the necessary parts of the form requiring the information have been filled in with the required information.
- 10 (6) "Declaration" means the declaration of an existing right filed with the department under section 8, Chapter 452, Laws of 1973.
- 11 (7) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.
- 12 (8) "Developed spring" means any artificial opening or excavation in the ground, however made, including any physical alteration at the point of
- 13 discharge regardless of whether it results in any increase in the yield of ground water, from which ground water is sought or can be obtained or through
- 14 which it flows under natural pressures or is artificially withdrawn.
- 15 (9) "Existing right" or "existing water right" means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973.
- 16 The term includes federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law.
- 17 (10) "Ground water" means any water that is beneath the ground surface.
- 18 (11) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive presumption of abandonment under 85-2-226.
- 19 (12) "Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.
- 20 (13) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency of
- 21 the United States, or any other entity.

(14) "Political subdivision" means any county, incorporated city or town, public corporation, or district created pursuant to state law or other public body of the state empowered to appropriate water. The term does not mean a private corporation, association, or group.

(15) "Salvage" means to make water available for beneficial use from an existing valid appropriation through application of water-saving methods.

(16) "State water reservation" means a water right created under state law after July 1, 1973, that reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of water throughout the year or at periods or for defined lengths of time.

(17) "Substantial credible information" means probable, believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested by the person providing the information.

(18) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

(19) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

(20) "Water division" means a drainage basin as defined in 3-7-102.

(21) "Water judge" means a judge as provided for in Title 3, chapter 7.

(22) "Water master" means a master as provided for in Title 3, chapter 7.

(23) "Watercourse" means any naturally occurring stream or river from which water is diverted for beneficial uses. It does not include ditches, culverts, or other constructed waterways.

(24) "Well" means any artificial opening or excavation in the ground, however made, by which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn."

**Section 4.** Section 85-2-302, MCA, is amended to read:

**"85-2-302. Application for permit -- definition.** (1) Except as provided in 85-2-306, a person may not appropriate water or commence



1 construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the department.

2 (2) The department shall adopt rules that are necessary to determine whether or not an application is correct and complete, based on the  
3 provisions applicable to issuance of a permit under this part. The rules must be adopted in compliance with Title 2, chapter 4.

4 (3) The application must be made on a form prescribed by the department. The department shall make the forms available through its offices.

5 (4) (a) Subject to subsection (4)(b), the ~~The~~ applicant shall submit a correct and complete application. The determination of whether an application  
6 is correct and complete must be based on rules adopted under subsection (2) that are in effect at the time the application is submitted.

7 (b) If an application is for a permit to appropriate water with a point of diversion, conveyance, or place of use on national forest system lands, the  
8 application is not correct and complete under this section until the applicant has submitted proof of any written special use authorization required by federal  
9 law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or  
10 distribution of water under the permit.

11 (c) As used in this part, "national forest system lands" has the same meaning as that provided in [section 1, Article I].

12 (5) The department shall notify the applicant of any defects in an application within 180 days. The defects must be identified by reference to the  
13 rules adopted under subsection (2). If the department does not notify the applicant of any defects within 180 days, the application must be treated as a  
14 correct and complete application.

15 (6) An application does not lose priority of filing because of defects if the application is corrected or completed within 30 days of the date of  
16 notification of the defects or within a further time as the department may allow, but not to exceed 90 days from the date of notification. If an application is  
17 made correct and complete after the mandated time period, but within 90 days of the date of notification of the defects, the priority date of the application  
18 is the date the application is made correct and complete.

19 (7) An application not corrected or completed within 90 days from the date of notification of the defects is terminated."  
20

21 **Section 5.** Section 85-2-306, MCA, is amended to read:

1       **"85-2-306. Exceptions to permit requirements.** (1) (a) Except as provided in subsection (1)(b), ground Ground water may be appropriated only

2       by a person who has a possessory interest in the property where the water is to be put to beneficial use and exclusive property rights in the ground water  
3       development works, ~~or, if~~

4       (b) If another person has rights in the ground water development works, water may be appropriated with the written consent of the person with  
5       those property rights or, if the ground water development works are on national forest system lands, with any prior written special use authorization required  
6       by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use,  
7       or distribution of water under the certificate.

8       (c) If the person does not have a possessory interest in the real property from which the ground water may be appropriated, the person shall  
9       provide to the owner of the real property written notification of the works and the person's intent to appropriate ground water from the works. The written  
10      notification must be provided to the landowner at least 30 days prior to constructing any associated works or, if no new or expanded works are proposed,  
11      30 days prior to appropriating the water. The written notification under this subsection is a notice requirement only and does not create an easement in  
12      or over the real property where the ground water development works are located.

13      (2) Inside the boundaries of a controlled ground water area, ground water may be appropriated only:

14      (a) according to a permit received pursuant to 85-2-508; or

15      (b) according to the requirements of an order issued pursuant to 85-2-507.

16      (3) (a) Outside the boundaries of a controlled ground water area, a permit is not required before appropriating ground water by means of a well  
17      or developed spring with a maximum appropriation of 35 gallons a minute or less, not to exceed 10 acre-feet a year, except that a combined appropriation  
18      from the same source from two or more wells or developed springs exceeding this limitation requires a permit.

19      (b) (i) Within 60 days of completion of the well or developed spring and appropriation of the ground water for beneficial use, the appropriator shall  
20      file a notice of completion with the department on a form provided by the department through its offices.

21      (ii) Upon receipt of the notice, the department shall review the notice and may, before issuing a certificate of water right, return a defective notice

1 for correction or completion, together with the reasons for returning it. A notice does not lose priority of filing because of defects if the notice is corrected,  
2 completed, and refiled with the department within 30 days of notification of defects or within a further time as the department may allow, not to exceed 6  
3 months.

4 (iii) If a notice is not corrected and completed within the time allowed, the priority date of appropriation is the date of refileing a correct and complete  
5 notice with the department.

6 (c) A certificate of water right may not be issued until a correct and complete notice has been filed with the department, including proof of  
7 landowner notification or a written federal special use authorization as necessary under subsection (1). The original of the certificate must be sent to the  
8 appropriator. The department shall keep a copy of the certificate in its office in Helena. The date of filing of the notice of completion is the date of priority  
9 of the right.

10 (4) An appropriator of ground water by means of a well or developed spring first put to beneficial use between January 1, 1962, and July 1, 1973,  
11 who did not file a notice of completion, as required by laws in force prior to April 14, 1981, with the county clerk and recorder shall file a notice of completion,  
12 as provided in subsection (3), with the department to perfect the water right. The filing of a claim pursuant to 85-2-221 is sufficient notice of completion  
13 under this subsection. The priority date of the appropriation is the date of the filing of a notice, as provided in subsection (3), or the date of the filing of the  
14 claim of existing water right.

15 (5) An appropriation under subsection (4) is an existing right, and a permit is not required. However, the department shall acknowledge the receipt  
16 of a correct and complete filing of a notice of completion, except that for an appropriation of 35 gallons a minute or less, not to exceed 10 acre-feet a year,  
17 the department shall issue a certificate of water right. If a certificate is issued under this section, a certificate need not be issued under the adjudication  
18 proceedings provided for in 85-2-236.

19 (6) A permit is not required before constructing an impoundment or pit and appropriating water for use by livestock if:

20 (a) the maximum capacity of the impoundment or pit is less than 15 acre-feet;

21 (b) the appropriation is less than 30 acre-feet a year;

1 (c) the appropriation is from a source other than a perennial flowing stream; and

2 (d) the impoundment or pit is to be constructed on and will be accessible to a parcel of land that is owned or under the control of the applicant  
3 and that is 40 acres or larger.

4 (7) (a) Within 60 days after constructing an impoundment or pit, the appropriator shall apply for a permit as prescribed by this part. ~~Upon Subject~~  
5 ~~to subsection (7)(b), upon~~ receipt of a correct and complete application for a ~~stockwater~~ stock water provisional permit, the department shall automatically  
6 issue a provisional permit. If the department determines after a hearing that the rights of other appropriators have been or will be adversely affected, it may  
7 revoke the permit or require the permittee to modify the impoundment or pit and may then make the permit subject to terms, conditions, restrictions, or  
8 limitations that it considers necessary to protect the rights of other appropriators.

9 (b) If the impoundment or pit is on national forest system lands, an application is not correct and complete under this section until the applicant  
10 has submitted proof of any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose  
11 of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

12 (8) A person may also appropriate water without applying for or prior to receiving a permit under rules adopted by the department under 85-2-113."  
13

14 **Section 6.** Section 85-2-308, MCA, is amended to read:

15 **"85-2-308. Objections.** (1) (a) An objection to an application under this chapter must be filed by the date specified by the department under  
16 85-2-307(2).

17 (b) The objection to an application for a permit must state the name and address of the objector and facts indicating that one or more of the criteria  
18 in 85-2-311 are not met.

19 (2) For an application for a change in appropriation rights, the objection must state the name and address of the objector and facts indicating that  
20 one or more of the criteria in 85-2-402 and [section 2], if applicable, are not met.

21 (3) A person has standing to file an objection under this section if the property, water rights, or interests of the objector would be adversely affected

1 by the proposed appropriation.

2 (4) For an application for a reservation of water, the objection must state the name and address of the objector and facts indicating that one or  
3 more of the criteria in 85-2-316 are not met.

4 (5) An objector to an application under this chapter shall file a correct and complete objection on a form prescribed by the department within the  
5 time period stated on the public notice associated with the application. In order to assist both applicants and objectors, the department shall adopt rules  
6 in accordance with this chapter delineating the components of a correct and complete objection. For instream flow water rights for fish, wildlife, and  
7 recreation, the rules must require the objector to describe the reach or portion of the reach of the stream or river subject to the instream flow water right  
8 and the beneficial use that is adversely affected and to identify the point or points where the instream flow water right is measured and monitored. The  
9 department shall notify the objector of any defects in an objection. An objection not corrected or completed within 15 days from the date of notification of  
10 the defects is terminated.

11 (6) An objection is valid if the objector has standing pursuant to subsection (3), has filed a correct and complete objection within the prescribed  
12 time period, and has stated the applicable information required under this section and rules of the department."  
13

14 **Section 7.** Section 85-2-310, MCA, is amended to read:

15 **"85-2-310. Action on application for permit or change in appropriation right.** (1) The department shall grant, deny, or condition an application  
16 for a permit or change in appropriation right in whole or in part within 120 days after the last date of publication of the notice of application if no objections  
17 have been received and within 180 days if a hearing is held or objections have been received. However, in either case the time may be extended upon  
18 agreement of the applicant or, in those cases where an environmental impact statement must be prepared or in other extraordinary cases, may be extended  
19 by not more than 60 days upon order of the department. If the department orders the time extended, it shall serve a notice of the extension and the reasons  
20 for the extension by first-class mail upon the applicant and each person who has filed an objection as provided by 85-2-308.

21 (2) If an application is to appropriate water with a point of diversion, conveyance, or place of use on national forest system lands, any application

1 approved by the department is subject to any written special use authorization required by federal law to occupy, use, or traverse national forest system  
2 lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of the water applied for and any terms, conditions,  
3 and limitations related to the use of water contained in any special use authorization required by federal law .

4 ~~(2)(3)~~ However, an Except as provided in subsection (2), an application may not be denied or approved in a modified form or upon terms,  
5 conditions, or limitations specified by the department, unless the applicant is first granted an opportunity to be heard. If ~~no~~ an objection is not filed against  
6 the application but the department is of the opinion that the application should be denied or approved in a modified form or upon terms, conditions, or  
7 limitations specified by it, the department shall prepare a statement of its opinion and its reasons for the opinion. The department shall serve a statement  
8 of its opinion by first-class mail upon the applicant, with a notice that the applicant may obtain a hearing by filing a request within 30 days after the notice  
9 is mailed. The notice must further state that the application will be modified in a specified manner or denied unless a hearing is requested.

10 ~~(3)(4)~~ The department may cease action upon an application for a permit or change in appropriation right and return it to the applicant when it  
11 finds that the application is not in good faith or does not show a bona fide intent to appropriate water for a beneficial use. An application returned for either  
12 of these reasons must be accompanied by a statement of the reasons for which it was returned, and for a permit application there is not a right to a priority  
13 date based upon the filing of the application. Returning an application pursuant to this subsection is a final decision of the department.

14 ~~(4)(5)~~ For all applications filed after July 1, 1973, the department shall find that an application is not in good faith or does not show a bona fide  
15 intent to appropriate water for a beneficial use if:

16 (a) an application is not corrected and completed as required by 85-2-302;

17 (b) the appropriate filing fee is not paid;

18 (c) the application does not document:

19 (i) a beneficial use of water;

20 (ii) the proposed place of use of all water applied for;

21 (iii) for an appropriation of 4,000 acre-feet a year or more and 5.5 cubic feet per second or more, a detailed project plan describing when and how

1 much water will be put to a beneficial use. The project plan must include a reasonable timeline for the completion of the project and the actual application  
2 of the water to a beneficial use.

3 (iv) for appropriations not covered in subsection (4)(c)(iii), a general project plan stating when and how much water will be put to a beneficial use;  
4 and

5 (v) if the water applied for is to be appropriated above that which will be used solely by the applicant or if it will be marketed by the applicant to  
6 other users, information detailing:

7 (A) each person who will use the water and the amount of water each person will use;

8 (B) the proposed place of use of all water by each person;

9 (C) the nature of the relationship between the applicant and each person using the water; and

10 (D) each firm contractual agreement for the specified amount of water for each person using the water; or

11 (d) the appropriate environmental impact statement costs or fees, if any, are not paid as required by 85-2-124."

12

13 **Section 8.** Section 85-2-311, MCA, is amended to read:

14 **"85-2-311. Criteria for issuance of permit.** (1) A permit may be issued under this part prior to the adjudication of existing water rights in a source  
15 of supply. In a permit proceeding under this part, there is no presumption that an applicant for a permit cannot meet the statutory criteria of this section  
16 prior to the adjudication of existing water rights pursuant to this chapter. In making a determination under this section, the department may not alter the  
17 terms and conditions of an existing water right or an issued certificate, permit, or state water reservation. Except as provided in subsections (3) and (4),  
18 the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

19 (a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

20 (ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested,  
21 based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the

1 following factors:

2 (A) identification of physical water availability;

3 (B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

4 (C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical  
5 water supply at the proposed point of diversion with the existing legal demands on the supply of water.

6 (b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely  
7 affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that  
8 demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

9 (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

10 (d) the proposed use of water is a beneficial use;

11 (e) the applicant has a possessory interest; or the written consent of the person with the possessory interest; in the property where the water is  
12 to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has  
13 any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion,  
14 impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;

15 (f) the water quality of a prior appropriator will not be adversely affected;

16 (g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

17 (h) the ability of a discharge permitholder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not  
18 be adversely affected.

19 (2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid  
20 objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h),  
21 as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district



1 established under Title 7, chapter 13, part 45, may file a valid objection.

2 (3) The department may not issue a permit for an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second  
3 of water unless the applicant proves by clear and convincing evidence that:

4 (a) the criteria in subsection (1) are met;

5 (b) the proposed appropriation is a reasonable use. A finding must be based on a consideration of the following:

6 (i) the existing demands on the state water supply, as well as projected demands, such as reservations of water for future beneficial purposes,  
7 including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;

8 (ii) the benefits to the applicant and the state;

9 (iii) the effects on the quantity and quality of water for existing beneficial uses in the source of supply;

10 (iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;

11 (v) the effects on private property rights by any creation of or contribution to saline seep; and

12 (vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75,  
13 chapter 1, or Title 75, chapter 20.

14 (4) (a) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water  
15 supplies for the state's water requirements, including requirements for federal non-Indian and Indian reserved water rights held by the United States for  
16 federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under  
17 appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation  
18 of its waters, the criteria in this subsection (4) must be met before out-of-state use may occur.

19 (b) The department may not issue a permit for the appropriation of water for withdrawal and transportation for use outside the state unless the  
20 applicant proves by clear and convincing evidence that:

21 (i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection (1) or (3) are met;

1 (ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

2 (iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

3 (c) In determining whether the applicant has proved by clear and convincing evidence that the requirements of subsections (4)(b)(ii) and (4)(b)(iii)  
4 are met, the department shall consider the following factors:

5 (i) whether there are present or projected water shortages within the state of Montana;

6 (ii) whether the water that is the subject of the application could feasibly be transported to alleviate water shortages within the state of Montana;

7 (iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

8 (iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

9 (d) When applying for a permit or a lease to withdraw and transport water for use outside the state, the applicant shall submit to and comply with  
10 the laws of the state of Montana governing the appropriation, lease, and use of water.

11 (5) To meet the preponderance of evidence standard in this section, the applicant, in addition to other evidence demonstrating that the criteria  
12 of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information  
13 developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.

14 (6) An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the  
15 provisions of this section is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an  
16 unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through  
17 an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except  
18 in accordance with this section.

19 (7) The department may adopt rules to implement the provisions of this section."  
20

21 **Section 9.** Section 85-2-312, MCA, is amended to read:

1       **"85-2-312. Terms of permit.** (1) (a) The department may issue a permit for less than the amount of water requested, but may not issue a permit  
2 for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require  
3 modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms,  
4 conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue  
5 temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

6       (b) If the permit is for use of water with a point of diversion, conveyance, or place of use on national forest system lands, the permit is subject to  
7 any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion,  
8 impoundment, storage, transportation, withdrawal, use, or distribution of the water under the permit and any terms, conditions, and limitations related to  
9 the use of water contained in any special use authorization required by federal law.

10       (2) The department shall specify in the permit or in any authorized extension of time provided in subsection (3), the time limits for commencement  
11 of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. In fixing those time limits, the  
12 department shall consider the cost and magnitude of the project, the engineering and physical features to be encountered, and, on projects designed for  
13 gradual development and gradually increased use of water, the time reasonably necessary for that gradual development and increased use. The  
14 department shall issue the permit or authorized extension of time subject to the terms, conditions, restrictions, and limitations it considers necessary to  
15 ensure that the work on the appropriation is commenced, conducted, and completed and that the water is actually applied in a timely manner to the  
16 beneficial use specified in the permit.

17       (3) The department shall by rule or by condition to a permit establish a process allowing for the extension of the time limits specified in the permit  
18 for commencement of the appropriation works, completion of construction, and actual application of water to the proposed beneficial use. If a permit  
19 commencement of the appropriation works, completion of construction, or the actual application of water to the proposed beneficial use is not completed  
20 within the time limit specified or within an extension of that time limit, the permit is void upon lapse of the time limit.

21       (4) The original of the permit must be sent to the permittee, and a copy must be kept in the office of the department in Helena."

1  
2       **Section 10.** Section 85-2-316, MCA, is amended to read:

3       **"85-2-316. State reservation of waters.** (1) The state, any political subdivision or agency of the state, or the United States or any agency of the  
4 United States may apply to the department to acquire a state water reservation for existing or future beneficial uses or to maintain a minimum flow, level,  
5 or quality of water throughout the year or at periods or for a length of time that the department designates.

6       (2) (a) Water may be reserved for existing or future beneficial uses in the basin where it is reserved, as described by the following basins:

7       (i) the Clark Fork River and its tributaries to its confluence with Lake Pend Oreille in Idaho;

8       (ii) the Kootenai River and its tributaries to its confluence with Kootenay Lake in British Columbia;

9       (iii) the St. Mary River and its tributaries to its confluence with the Oldman River in Alberta;

10       (iv) the Little Missouri River and its tributaries to its confluence with Lake Sakakawea in North Dakota;

11       (v) the Missouri River and its tributaries to its confluence with the Yellowstone River in North Dakota; and

12       (vi) the Yellowstone River and its tributaries to its confluence with the Missouri River in North Dakota.

13       (b) A state water reservation may be made for an existing or future beneficial use outside the basin where the diversion occurs only if stored water  
14 is not reasonably available for water leasing under 85-2-141 and the proposed use would occur in a basin designated in subsection (2)(a).

15       (3) (a) The department shall adopt rules that are necessary to determine whether or not an application is correct and complete based on the  
16 provisions applicable to issuance of a state water reservation. The rules must be adopted in compliance with Title 2, chapter 4.

17       (b) An applicant shall submit a correct and complete application. The determination of whether an application is correct and complete must be  
18 based on rules adopted under this subsection (3) that are in effect at the time the application is submitted. The department shall proceed in accordance  
19 with 85-2-302 with regard to any defects in the application.

20       (c) The application must be made on a form prescribed by the department. The department shall make the forms available through its offices.

21       ~~(3)~~(d) Upon receiving a correct and complete application, the department shall proceed in accordance with 85-2-307 through 85-2-309. After the

1 hearing provided for in 85-2-309, the department shall decide whether to reserve the water for the applicant. The department's costs of giving notice,  
2 holding the hearing, conducting investigations, and making records incurred in acting upon the application to reserve water, except the cost of salaries  
3 of the department's personnel, must be paid by the applicant. In addition, a reasonable proportion of the department's cost of preparing an environmental  
4 ~~impact statement analysis~~ must be paid by the applicant unless waived by the department upon a showing of good cause by the applicant.

5 (4) (a) ~~The~~ Except as provided in [section 1], the department may not adopt an order reserving water unless shall issue a state water reservation  
6 if the applicant establishes to the satisfaction of the department by a preponderance of evidence:

- 7 (i) the purpose of the reservation;  
8 (ii) the need for the reservation;  
9 (iii) the amount of water necessary for the purpose of the reservation;  
10 (iv) that the reservation is in the public interest.

11 (b) In determining the public interest under subsection (4)(a)(iv), the department ~~may not adopt an order reserving water for withdrawal and~~  
12 ~~transport for use outside the state unless~~ shall issue a water reservation for withdrawal and transport for use outside the state if the applicant proves by  
13 clear and convincing evidence that:

- 14 (i) the proposed out-of-state use of water is not contrary to water conservation in Montana; and  
15 (ii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.  
16 (c) In determining whether the applicant has proved by clear and convincing evidence that the requirements of subsections (4)(b)(i) and (4)(b)(ii)  
17 are met, the department shall consider the following factors:  
18 (i) whether there are present or projected water shortages within the state of Montana;  
19 (ii) whether the water that is the subject of the application could feasibly be transported to alleviate water shortages within the state of Montana;  
20 (iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and  
21 (iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

1 (d) When applying for a state water reservation to withdraw and transport water for use outside the state, the applicant shall submit to and comply  
2 with the laws of the state of Montana governing the appropriation, lease, use, and reservation of water.

3 (5) If the purpose of the state water reservation requires construction of a storage or diversion facility, the applicant shall establish to the  
4 satisfaction of the department by a preponderance of evidence that there will be progress toward completion of the facility and accomplishment of the  
5 purpose with reasonable diligence in accordance with an established plan.

6 (6) The department shall limit any state water reservations after May 9, 1979, for maintenance of minimum flow, level, or quality of water that it  
7 awards at any point on a stream or river to a maximum of 50% of the average annual flow of record on gauged streams. Ungauged streams ~~may be~~  
8 ~~allocated at the discretion of the department~~ are not subject to the limit under this subsection.

9 (7) ~~After the adoption of an order reserving waters, the department may reject an application and refuse a permit for the appropriation of reserved~~  
10 ~~waters or may issue the permit subject to terms and conditions that it considers necessary for the protection of the objectives of the reservation. A state~~  
11 water reservation issued under this section has a priority of appropriation dating from the filing of a correct and complete application with the department.

12 (8) (a) A person desiring to use water reserved to a conservation district for agricultural purposes shall make application for the use with the district,  
13 and the district, upon approval of the application, shall inform the department of the approved use and issue the applicant an authorization for the use.  
14 The department shall maintain records of all uses of water reserved to conservation districts and be responsible, when requested by the districts, for  
15 rendering technical and administrative assistance within the department's staffing and budgeting limitations in the preparation and processing of the  
16 applications for the conservation districts. The department shall, within its staffing and budgeting limitations, complete any feasibility study requested by  
17 the districts within 12 months of the time that the request was made. The department shall extend the time allowed to develop a plan identifying projects  
18 for using a district's reservation as long as the conservation district makes a good faith effort, within its staffing and budget limitations, to develop a plan.

19 (b) Upon actual application of water to the proposed beneficial use, the authorized user shall notify the conservation district. The notification must  
20 contain a certified statement by a person with experience in the design, construction, or operation of project works for agricultural purposes describing how  
21 the reserved water was put to use. The department or the district may then inspect the appropriation to determine if it has been completed in substantial

1 accordance with the authorization.

2 ~~——— (9) Except as provided in 85-2-331, the priority of appropriation of a state water reservation and the relative priority of the reservation to permits~~  
3 ~~with a later priority of appropriation must be determined according to this subsection (9), as follows:~~

4 ~~——— (a) A state water reservation under this section has a priority of appropriation dating from the filing with the department of a notice of intention to~~  
5 ~~apply for a state water reservation in a basin in which no other notice of intention to apply is currently pending. The notice of intention to apply must specify~~  
6 ~~the basin in which the applicant is seeking a state water reservation.~~

7 ~~——— (b) Upon receiving a notice of intention to apply for a state water reservation, the department shall identify all potential state water reservation~~  
8 ~~applicants in the basin specified in the notice and notify each potential applicant of the opportunity to submit an application and to receive a state water~~  
9 ~~reservation with the priority of appropriation as described in subsection (9)(a).~~

10 ~~——— (c) To receive the priority of appropriation described in subsection (9)(a), the applicant shall submit a correct and complete state water reservation~~  
11 ~~application within 1 year after the filing of the notice of intention to apply. Upon a showing of good cause, the department may extend the time for preparing~~  
12 ~~the application.~~

13 ~~——— (d) The department may by order subordinate a state water reservation to a permit or a certificate for ground water development issued pursuant~~  
14 ~~to this part if:~~

15 ~~——— (i) the permit application or the notice of completion of ground water development was accepted by the department before the date of the order~~  
16 ~~granting the reservation;~~

17 ~~——— (ii) the effect of subordinating the reservation to one or more permits or certificates for ground water development does not interfere substantially~~  
18 ~~with the purpose of the reservation; and~~

19 ~~——— (iii) in the case of a certificate for ground water development, the reservant consents to the subordination.~~

20 ~~——— (e) The department shall by order establish the relative priority of state water reservations approved under this section that have the same day~~  
21 ~~of priority. A state water reservation may not adversely affect any rights in existence at that time.~~

1       (9) A state water reservation issued under this section may not adversely affect any rights in existence at that time. The department may issue  
2       a state water reservation subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria of this section.

3       (10) ~~The~~ Upon issuing a state water reservation for the purpose of maintaining a minimum flow, level, or quality of water, the appropriation of water  
4       is complete. Except as provided in [section 1], the department shall, periodically but at least once every 10 years, review existing state water reservations  
5       to ensure that the objectives of the reservations are being met. When the objectives of a state water reservation are not being met, the department may  
6       extend, revoke, or modify the reservation. Any undeveloped water made available as a result of a revocation or modification under this subsection is  
7       available for appropriation by others pursuant to this part.

8       (11) ~~The~~ Except as provided in [section 1], the department may modify an existing or future order originally adopted to reserve water for the purpose  
9       of maintaining minimum flow, level, or quality of water, so as to reallocate the state water reservation or portion of the reservation to an applicant who is  
10      a qualified reservant under this section. Reallocation of water reserved pursuant to a state water reservation may be made by the department following  
11      notice and hearing if the department finds that all or part of the reservation is not required for its purpose and that the need for the reallocation has been  
12      shown by the applicant to outweigh the need shown by the original reservant. Reallocation of reserved water may not adversely affect the priority date  
13      of the reservation, and the reservation retains its priority date despite reallocation to a different entity for a different use. The department may not reallocate  
14      water reserved under this section on any stream or river more frequently than once every 5 years.

15      (12) A reservant may not make a change in a state water reservation under this section, except as permitted under 85-2-402 and this subsection.  
16      If the department approves a change, the department shall give notice and require the reservant to establish that the criteria in subsection (4) will be met  
17      under the approved change.

18      (13) A state water reservation may be transferred to another entity qualified to hold a reservation under subsection (1). Only the entity holding the  
19      reservation may initiate a transfer. The transfer occurs upon the filing of a water right ownership update form with the department, together with an affidavit  
20      from the entity receiving the reservation establishing that the entity is a qualified reservant under subsection (1), that the entity agrees to comply with the  
21      requirements of this section and the conditions of the reservation, and that the entity can meet the objectives of the reservation as granted. If the transfer



1 of a state water reservation involves a change in an appropriation right, the necessary approvals must be acquired pursuant to subsection (12).

2 (14) This section does not vest the department with the authority to alter a water right that is not a state water reservation.

3 (15) The department shall undertake a program to educate the public, other state agencies, and political subdivisions of the state as to the benefits  
4 of the state water reservation process and the procedures to be followed to secure the reservation of water. The department shall provide technical  
5 assistance to other state agencies and political subdivisions in applying for reservations under this section.

6 (16) Water reserved under this section is not subject to the state water leasing program established under 85-2-141."  
7

8 **Section 11.** Section 85-2-319, MCA, is amended to read:

9 **"85-2-319. Permit action in highly appropriated basins or subbasins.** (1) With regard to a highly appropriated basin or subbasin, except as  
10 provided in [section 1], the legislature may by law preclude permit applications or the department may by rule reject permit applications or modify or  
11 condition permits already issued.

12 (2) A rule may be adopted under this section only upon a petition that is signed by at least 25% or 10, whichever is less, of the users of water in  
13 the source of supply within a basin or subbasin or upon petition of the department of environmental quality that alleges facts under subsection (2)(d). The  
14 petition must be in a form prescribed by the department and must allege facts showing that throughout or at certain times of the year or for certain beneficial  
15 uses:

16 (a) there are no unappropriated waters in the source of supply;

17 (b) the rights of prior appropriators will be adversely affected;

18 (c) further uses will interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has  
19 been reserved; or

20 (d) in the case of a petition filed by the department of environmental quality:

21 (i) the water quality of an appropriator will be adversely affected by the issuance of permits;

(ii) further use will not be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); or

(iii) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will be adversely affected by the issuance of permits.

(3) Within 60 days after submission of a petition, the department shall:

(a) deny the petition in writing, stating its reasons for denial;

(b) inform the petitioners that the department shall study the allegations further before denying or proceeding further with the petition; or

(c) initiate rulemaking proceedings in accordance with 2-4-302 through 2-4-305.

(4) Title 2, chapter 4, parts 1 through 4, govern rulemaking proceedings conducted under this section, except that in addition to the notice requirements of those parts, the department notice of the rulemaking hearing must be published at least once in each week for 3 successive weeks, not less than 30 days before the date of the hearing, in a newspaper of general circulation in the county or counties in which the source is located. The department shall serve by mail a copy of the notice, not less than 30 days before the hearing, upon each person or public agency known from the examination of the records of the department to be a claimant, appropriator, or permit holder of water in the source.

(5) The department may adopt rules to implement the provisions of this section."

**Section 12.** Section 85-2-331, MCA, is amended to read:

**"85-2-331. Reservations within Missouri River basin and Little Missouri River basin.** (1) ~~The~~ Except as provided in [section 1], the state, an agency or political subdivision of the state, or the United States or an agency of the United States that desires to apply for a state water reservation in the Missouri River basin or in the Little Missouri River basin shall file an application pursuant to 85-2-316 no later than:

(a) July 1, 1989, for reservation of water above Fort Peck dam; or

(b) July 1, 1991, for reservation of water below Fort Peck dam and in the Little Missouri River basin.

(2) Subject to legislative appropriation, the department shall provide technical and financial assistance to other state agencies and political

1 subdivisions in applying for state water reservations within the Missouri River basin and the Little Missouri River basin.

2 (3) Except as provided in [section 1], the department shall:

3 (a) ~~The department shall~~ make a final determination in accordance with 85-2-316 on all applications filed before July 1, 1989, for state water  
4 reservations in the Missouri River basin above Fort Peck dam.

5 (b) ~~The department shall~~ make a final determination in accordance with 85-2-316 on all applications filed before July 1, 1991, for state water  
6 reservations in the Missouri River basin below Fort Peck dam and in the Little Missouri River basin.

7 (c) ~~The department shall~~ determine which applications or portions of applications are considered to be above or below Fort Peck dam.

8 (4) ~~State~~ Except as provided in [section 1], state water reservations approved by the department under this section have a priority date of July  
9 1, 1985, in the Missouri River basin and a priority date of July 1, 1989, in the Little Missouri River basin. If the department issued a permit under Title 85,  
10 chapter 2, part 3, prior to the granting of a state water reservation under this section, the department may subordinate the state water reservation to the  
11 permit if it finds that the subordination does not interfere substantially with the purpose of any state water reservation. If the department issued a certificate  
12 for ground water development under Title 85, chapter 2, part 3, prior to the granting of a reservation under this section, the department may subordinate  
13 the reservation to the certificate if it finds that the subordination does not interfere substantially with the purpose of any reservation and the reservant  
14 consents to the subordination. The department shall by order establish the relative priority of applications approved under this section."  
15

16 **Section 13.** Section 85-2-336, MCA, is amended to read:

17 **"85-2-336. Basin closure -- exception.** (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department  
18 may not process or grant an application for a permit to appropriate water within the Upper Clark Fork River basin.

19 (2) The provisions of subsection (1) do not apply to:

20 (a) an application for a permit to appropriate ground water;

21 (b) an application filed prior to January 1, 2000, for a permit to appropriate water to conduct response actions or remedial actions pursuant to the

1 federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, or Title 75, chapter 10, part 7, at sites designated  
2 as of January 1, 1994. The total flow rates for all permits issued under this subsection (2)(b) may not exceed 10 cubic feet per second. A permit issued  
3 to conduct response actions or remedial actions may not be used for dilution and must be limited to a term not to exceed the necessary time to complete  
4 the response or remedial action, and the permit may not be transferred to any person for any purpose other than the designated response or remedial  
5 action.

6 (c) an application for a permit to appropriate water for stock use;

7 (d) an application to store water; or

8 (e) an application submitted pursuant to [section 1, Article VI]; or

9 ~~(e)~~(f) an application for power generation at existing hydroelectric dams. The department may not approve a permit for power generation if approval  
10 results in additional consumption of water.

11 (3) ~~Applications~~ Except as provided in [section 1], applications for state water reservations in the Upper Clark Fork River basin filed pursuant to  
12 85-2-316 and pending as of May 1, 1991, have a priority date of May 1, 1991. The filing of a state water reservation application does not provide standing  
13 to object under 85-2-402.

14 (4) ~~The~~ Except as provided in [section 1], the department may not process or approve applications for state water reservations in the Upper Clark  
15 Fork River basin filed pursuant to 85-2-316."

16  
17 **Section 14.** Section 85-2-341, MCA, is amended to read:

18 **"85-2-341. Basin closure -- exceptions.** (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department  
19 may not process or grant an application for a permit to appropriate water or for a state water reservation to reserve water within the Jefferson River basin  
20 or Madison River basin.

21 (2) The provisions of subsection (1) do not apply to:

- 1 (a) an application for a permit to appropriate ground water;
- 2 (b) an application for a permit to appropriate water for a nonconsumptive use;
- 3 (c) an application for a permit to appropriate water for domestic, municipal, or stock use;
- 4 (d) an application to store water during high spring flows;
- 5 (e) an application submitted pursuant to [section 1, Article VI]; or
- 6 ~~(e)~~(f) temporary emergency appropriations as provided for in 85-2-113(3)."

7

8 **Section 15.** Section 85-2-343, MCA, is amended to read:

9 **"85-2-343. Basin closure -- exceptions.** (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department

10 may not process or grant an application for a permit to appropriate water or for a reservation to reserve water within the upper Missouri River basin until

11 the final decrees have been issued in accordance with part 2 of this chapter for all of the subbasins of the upper Missouri River basin.

12 (2) The provisions of subsection (1) do not apply to:

- 13 (a) an application for a permit to appropriate ground water;
- 14 (b) an application for a permit to appropriate water for a nonconsumptive use;
- 15 (c) an application for a permit to appropriate water for domestic, municipal, or stock use;
- 16 (d) an application to store water during high spring flows;
- 17 (e) an application for a permit to use water from the Muddy Creek drainage, which drains to the Sun River, if the proposed use of water will help
- 18 control erosion in the Muddy Creek drainage;
- 19 (f) an application submitted pursuant to [section 1, Article VI]; or
- 20 ~~(f)~~(g) temporary emergency appropriations as provided for in 85-2-113(3)."

1           **Section 16.** Section 85-2-344, MCA, is amended to read:

2           **"85-2-344. Bitterroot River subbasin temporary closure -- definitions -- exceptions.** (1) Unless the context requires otherwise, in this section,  
3 the following definitions apply:

4           (a) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state water reservation pursuant to 85-2-316.

5           (b) "Bitterroot River basin" means the drainage area of the Bitterroot River and its tributaries above the confluence of the Bitterroot River and Clark  
6 Fork of the Columbia River and designated as "Basin 76H".

7           (c) "Bitterroot River subbasin" means one of the following hydrologically related portions of the Bitterroot River basin:

8           (i) the mainstem subbasin, designated as "Subbasin 76HA";

9           (ii) the north end subbasin, designated as "Subbasin 76HB";

10          (iii) the east side subbasin, designated as "Subbasin 76HC";

11          (iv) the southeast subbasin, designated as "Subbasin 76HD";

12          (v) the south end subbasin, designated as "Subbasin 76HE";

13          (vi) the southwest subbasin, designated as "Subbasin 76HF";

14          (vii) the west central subbasin, designated as "Subbasin 76HG"; or

15          (viii) the northwest subbasin, designated as "Subbasin 76HH".

16          (2) As provided in 85-2-319, the department may not process or grant an application for a permit to appropriate water or for a state water  
17 reservation within a Bitterroot River subbasin until the closure for the basin is terminated pursuant to subsection (3) of this section, except for:

18          (a) an application for a permit to appropriate ground water;

19          (b) an application for a permit to appropriate water for a municipal water supply;

20          (c) temporary emergency appropriations pursuant to 85-2-113(3);

21          (d) an application submitted pursuant to [section 1, Article VI]; or

(d)(e) an application to store water during high spring flow in an impoundment with a capacity of 50 acre-feet or more.

(3) Each Bitterroot River subbasin is closed to new appropriations and new state water reservations until 2 years after all water rights in the subbasin arising under the laws of the state are subject to an enforceable and administrable decree as provided in 85-2-406(4)."

**Section 17.** Section 85-2-401, MCA, is amended to read:

**"85-2-401. Priority -- recognition and confirmation of changes in appropriations issued after July 1, 1973.** (1) As between appropriators, the first in time is the first in right. Priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the increase or decrease of streamflow or the lowering of a water table, artesian pressure, or water level, if the prior appropriator can reasonably exercise the water right under the changed conditions.

(2) Priority of appropriation made under this chapter dates from the filing of an application for a permit with the department, except as otherwise provided in 85-2-301 through 85-2-303, 85-2-306, ~~85-2-310(3)~~ 85-2-310(4), and 85-2-313.

(3) Priority of appropriation perfected before July 1, 1973, must be determined as provided in part 2 of this chapter.

(4) All changes in appropriation rights actions of the department after July 1, 1973, are recognized and confirmed subject to this part and any terms, conditions, and limitations placed on a change in appropriation authorization by the department."

**Section 18.** Section 85-2-402, MCA, is amended to read:

**"85-2-402. (Temporary) Changes in appropriation rights -- definition.** (1) (a) The right to make a change subject to the provisions of this section in an existing water right, a permit, or a state water reservation is recognized and confirmed. In a change proceeding under this section, there is no presumption that an applicant for a change in appropriation right cannot establish lack of adverse effect prior to the adjudication of other rights in the source of supply pursuant to this chapter. Except as provided in 85-2-410 and subsections (15) and (16) of this section, an appropriator may not make a change in an appropriation right without the approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and complete

1 application.

2 (b) If an application involves a change in a point of diversion, conveyance, or place of use located on national forest system lands, the application  
3 is not correct and complete until the applicant has submitted proof to the department of any written special use authorization required by federal law for  
4 the proposed change in occupancy, use, or traverse of national forest system lands for the purpose of diversion, impoundment, storage, transportation,  
5 withdrawal, use, or distribution of water.

6 (c) As used in this part, "national forest system lands" has the same meaning as that provided in [section 1, Article I].

7 (2) Except as provided in subsections (4) through (6), (15), and (16) and, if applicable, subject to subsection (17), the department shall approve  
8 a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

9 (a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected  
10 or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

11 (b) Except for a lease authorization pursuant to 85-2-436 or a temporary change in appropriation right authorization to maintain or enhance  
12 streamflows to benefit the fishery resource pursuant to 85-2-408 or a change in appropriation right to instream flow to protect, maintain, or enhance  
13 streamflows pursuant to [section 2], the proposed means of diversion, construction, and operation of the appropriation works are adequate.

14 (c) The proposed use of water is a beneficial use.

15 (d) Except for a lease authorization pursuant to 85-2-436 or a temporary change in appropriation right authorization pursuant to 85-2-408 or a  
16 change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to [section 2], the applicant has a possessory interest,  
17 or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change  
18 involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required  
19 by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use,  
20 or distribution of water.

21 (e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water



1 asserted by the applicant.

2 (f) The water quality of an appropriator will not be adversely affected.

3 (g) The ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not  
4 be adversely affected.

5 (3) The applicant is required to prove that the criteria in subsections (2)(f) and (2)(g) have been met only if a valid objection is filed. A valid objection  
6 must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (2)(f) or (2)(g), as applicable,  
7 may not be met.

8 (4) The department may not approve a change in purpose of use or place of use of an appropriation of 4,000 or more acre-feet of water a year  
9 and 5.5 or more cubic feet per second of water unless the appropriator proves by a preponderance of evidence that:

10 (a) the criteria in subsection (2) are met; and

11 (b) the proposed change is a reasonable use. A finding of reasonable use must be based on a consideration of:

12 (i) the existing demands on the state water supply, as well as projected demands for water for future beneficial purposes, including municipal water  
13 supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;

14 (ii) the benefits to the applicant and the state;

15 (iii) the effects on the quantity and quality of water for existing uses in the source of supply;

16 (iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;

17 (v) the effects on private property rights by any creation of or contribution to saline seep; and

18 (vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75,  
19 chapter 1, or Title 75, chapter 20.

20 (5) The department may not approve a change in purpose of use or place of use for a diversion that results in 4,000 or more acre-feet of water  
21 a year and 5.5 or more cubic feet per second of water being consumed unless:

1 (a) the applicant proves by clear and convincing evidence and the department finds that the criteria in subsections (2) and (4) are met; and

2 (b) for the withdrawal and transportation of appropriated water for out-of-state use, the department then petitions the legislature and the legislature  
3 affirms the decision of the department after one or more public hearings.

4 (6) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies  
5 for the state's water requirements, including requirements for federal non-Indian and Indian reserved water rights held by the United States for federal  
6 reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate  
7 conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its  
8 waters, the following criteria must be met before out-of-state use may occur:

9 (a) The department and, if applicable, the legislature may not approve a change in appropriation right for the withdrawal and transportation of  
10 appropriated water for use outside the state unless the appropriator proves by clear and convincing evidence and, if applicable, the legislature approves  
11 after one or more public hearings that:

12 (i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection (2) or (4) are met;

13 (ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

14 (iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

15 (b) In determining whether the appropriator has proved by clear and convincing evidence that the requirements of subsections (6)(a)(ii) and  
16 (6)(a)(iii) will be met, the department and, if applicable, the legislature shall consider the following factors:

17 (i) whether there are present or projected water shortages within the state of Montana;

18 (ii) whether the water that is the subject of the proposed change in appropriation might feasibly be transported to alleviate water shortages within  
19 the state of Montana;

20 (iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

21 (iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

(c) When applying for a change in appropriation right to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation and use of water.

(7) For any application for a change in appropriation right involving 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the proposed change in accordance with 85-2-307 and shall hold one or more hearings in accordance with 85-2-309 prior to its approval or denial of the proposed change. The department shall provide notice and may hold one or more hearings upon any other proposed change in appropriation right if it determines that the proposed change might adversely affect the rights of other persons.

(8) The department or the legislature, if applicable, may approve a change in appropriation right subject to the terms, conditions, restrictions, and limitations that it considers necessary to satisfy the criteria of this section, including limitations on the time for completion of the change. The department may extend time limits specified in the change approval under the applicable criteria and procedures of 85-2-312(3).

(9) Upon actual application of water to the proposed beneficial use within the time allowed, the appropriator shall notify the department that the appropriation has been completed. The notification must contain a certified statement by a person with experience in the design, construction, or operation of appropriation works describing how the appropriation was completed.

(10) If a change in appropriation right is not completed as approved by the department or legislature or if the terms, conditions, restrictions, and limitations of the change approval are not complied with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why the change approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approval.

(11) The original of a change approval issued by the department must be sent to the applicant, and a duplicate must be kept in the office of the department in Helena.

(12) A person holding an issued permit or change approval that has not been perfected may change the place of diversion, place of use, purpose of use, or place of storage by filing an application for change pursuant to this section.

(13) A change in appropriation right contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may

1 not knowingly permit, aid, or assist in any manner an unauthorized change in appropriation right. A person or corporation may not, directly or indirectly,  
2 personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section.

3 (14) The department may adopt rules to implement the provisions of this section.

4 (15) (a) An appropriator may change an appropriation right for a replacement well without the prior approval of the department if:

5 (i) the appropriation right is for:

6 (A) ground water outside the boundaries of a controlled ground water area; or

7 (B) ground water inside the boundaries of a controlled ground water area and if the provisions of the order declaring the controlled ground water  
8 area do not restrict such a change;

9 (ii) the change in appropriation right is to replace an existing well and the existing well will no longer be used;

10 (iii) the rate and volume of the appropriation from the replacement well are equal to or less than that of the well being replaced and do not exceed:

11 (A) 450 gallons a minute for a municipal well; or

12 (B) 35 gallons a minute and 10 acre-feet a year for all other wells;

13 (iv) the water from the replacement well is appropriated from the same aquifer as the water appropriated from the well being replaced; and

14 (v) a timely, correct and complete notice of replacement well is submitted to the department as provided in subsection (15)(b).

15 (b) (i) After completion of a replacement well and appropriation of ground water for a beneficial use, the appropriator shall file a notice of  
16 replacement well with the department on a form provided by the department.

17 (ii) (A) The department shall review the notice of replacement well and shall issue an authorization of a change in an appropriation right if all of  
18 the criteria in subsection (15)(a) have been met and the notice is correct and complete.

19 (B) If the replacement well is located on national forest system lands, the notice is not correct and complete under this subsection (15) until the  
20 appropriator has submitted proof of any written special use authorization required by federal law to occupy, use, or traverse national forest system lands  
21 for the purpose of constructing the replacement well.

(iii) The department may not issue an authorization of a change in appropriation right until a correct and complete notice of replacement well has been filed with the department. The department shall return a defective notice to the appropriator, along with a description of defects in the notice. The appropriator shall refile a corrected and completed notice of replacement well within 30 days of notification of defects or within a further time as the department may allow, not to exceed 6 months.

(iv) If a notice of replacement well is not completed within the time allowed, the appropriator shall:

(A) cease appropriation of water from the replacement well pending approval by the department; and

(B) submit an application for a change in appropriation right to the department pursuant to subsections (1) through (3).

(c) The provisions of this subsection (15) do not apply to an appropriation right abandoned under 85-2-404.

(d) For each well that is replaced under this subsection (15), the appropriator shall follow the well abandonment procedures, standards, and rules adopted by the board of water well contractors pursuant to 37-43-202.

(e) The provisions of subsections (2), (3), (9), and (10) do not apply to a change in appropriation right that meets the requirements of subsection (15)(a).

(16) (a) An appropriator may change an appropriation right without the prior approval of the department for the purpose of constructing a redundant water supply well in a public water supply system, as defined in 75-6-102, if the redundant water supply well:

(i) withdraws water from the same ground water source as the original well; and

(ii) is required by a state or federal agency.

(b) The priority date of the redundant water supply well is the same as the priority date of the original well. Only one well may be used at one time.

(c) Within 60 days of completion of a redundant water supply well, the appropriator shall file a notice of construction of the well with the department on a form provided by the department. The department may return a defective notice of construction to the appropriator for correction and completion. If the redundant water supply well is located on national forest system lands, the notice is not correct and complete under this subsection until the appropriator has submitted proof of any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose

1 of constructing the redundant water supply well.

2 (d) The provisions of subsections (9) and (10) do not apply to a change in appropriation right that meets the requirements of this ~~section~~ subsection  
3 (16).

4 (17) The department shall accept and process an application for a change in appropriation right to instream flow to protect, maintain, or enhance  
5 streamflows pursuant to [section 2] and this section. (Terminates June 30, 2009--sec. 9, Ch. 123, L. 1999.)

6 **85-2-402. (Effective July 1, 2009) Changes in appropriation rights -- definition.** (1) (a) The right to make a change subject to the provisions  
7 of this section in an existing water right, a permit, or a state water reservation is recognized and confirmed. In a change proceeding under this section,  
8 there is no presumption that an applicant for a change in appropriation right cannot establish lack of adverse effect prior to the adjudication of other rights  
9 in the source of supply pursuant to this chapter. Except as provided in 85-2-410 and subsections (15) and (16) of this section, an appropriator may not  
10 make a change in an appropriation right without the approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and  
11 complete application.

12 (b) If an application involves a change in a point of diversion, conveyance, or place of use located on national forest system lands, the application  
13 is not correct and complete until the applicant has submitted proof to the department of any written special use authorization required by federal law for  
14 the proposed change in occupancy, use, or traverse of national forest system lands for the purpose of diversion, impoundment, storage, transportation,  
15 withdrawal, use, or distribution of water.

16 (c) As used in this part, "national forest system lands" has the same meaning as that provided in [section 1, Article I].

17 (2) Except as provided in subsections (4) through (6), (15), and (16) and, if applicable, subject to subsection (17), the department shall approve  
18 a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

19 (a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected  
20 or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

21 (b) Except for a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant

1 to 85-2-408 or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to [section 2], the proposed means  
2 of diversion, construction, and operation of the appropriation works are adequate.

3 (c) The proposed use of water is a beneficial use.

4 (d) Except for a temporary change in appropriation right authorization pursuant to 85-2-408 or a change in appropriation right to instream flow  
5 to protect, maintain, or enhance streamflows pursuant to [section 2], the applicant has a possessory interest, or the written consent of the person with the  
6 possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance,  
7 or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse  
8 national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water.

9 (e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water  
10 asserted by the applicant.

11 (f) The water quality of an appropriator will not be adversely affected.

12 (g) The ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not  
13 be adversely affected.

14 (3) The applicant is required to prove that the criteria in subsections (2)(f) and (2)(g) have been met only if a valid objection is filed. A valid objection  
15 must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (2)(f) or (2)(g), as applicable,  
16 may not be met.

17 (4) The department may not approve a change in purpose of use or place of use of an appropriation of 4,000 or more acre-feet of water a year  
18 and 5.5 or more cubic feet per second of water unless the appropriator proves by a preponderance of evidence that:

19 (a) the criteria in subsection (2) are met; and

20 (b) the proposed change is a reasonable use. A finding of reasonable use must be based on a consideration of:

21 (i) the existing demands on the state water supply, as well as projected demands for water for future beneficial purposes, including municipal water

1 supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;

2 (ii) the benefits to the applicant and the state;

3 (iii) the effects on the quantity and quality of water for existing uses in the source of supply;

4 (iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;

5 (v) the effects on private property rights by any creation of or contribution to saline seep; and

6 (vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75,  
7 chapter 1, or Title 75, chapter 20.

8 (5) The department may not approve a change in purpose of use or place of use for a diversion that results in 4,000 or more acre-feet of water  
9 a year and 5.5 or more cubic feet per second of water being consumed unless:

10 (a) the applicant proves by clear and convincing evidence and the department finds that the criteria in subsections (2) and (4) are met; and

11 (b) for the withdrawal and transportation of appropriated water for out-of-state use, the department then petitions the legislature and the legislature  
12 affirms the decision of the department after one or more public hearings.

13 (6) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies  
14 for the state's water requirements, including requirements for federal non-Indian and Indian reserved water rights held by the United States for federal  
15 reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate  
16 conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its  
17 waters, the following criteria must be met before out-of-state use may occur:

18 (a) The department and, if applicable, the legislature may not approve a change in appropriation right for the withdrawal and transportation of  
19 appropriated water for use outside the state unless the appropriator proves by clear and convincing evidence and, if applicable, the legislature approves  
20 after one or more public hearings that:

21 (i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection (2) or (4) are met;



1 (ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

2 (iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

3 (b) In determining whether the appropriator has proved by clear and convincing evidence that the requirements of subsections (6)(a)(ii) and  
4 (6)(a)(iii) will be met, the department and, if applicable, the legislature shall consider the following factors:

5 (i) whether there are present or projected water shortages within the state of Montana;

6 (ii) whether the water that is the subject of the proposed change in appropriation might feasibly be transported to alleviate water shortages within  
7 the state of Montana;

8 (iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

9 (iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

10 (c) When applying for a change in appropriation right to withdraw and transport water for use outside the state, the applicant shall submit to and  
11 comply with the laws of the state of Montana governing the appropriation and use of water.

12 (7) For any application for a change in appropriation right involving 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second  
13 of water, the department shall give notice of the proposed change in accordance with 85-2-307 and shall hold one or more hearings in accordance with  
14 85-2-309 prior to its approval or denial of the proposed change. The department shall provide notice and may hold one or more hearings upon any other  
15 proposed change in appropriation right if it determines that the proposed change might adversely affect the rights of other persons.

16 (8) The department or the legislature, if applicable, may approve a change in appropriation right subject to the terms, conditions, restrictions, and  
17 limitations that it considers necessary to satisfy the criteria of this section, including limitations on the time for completion of the change. The department  
18 may extend time limits specified in the change approval under the applicable criteria and procedures of 85-2-312(3).

19 (9) Upon actual application of water to the proposed beneficial use within the time allowed, the appropriator shall notify the department that the  
20 appropriation has been completed. The notification must contain a certified statement by a person with experience in the design, construction, or operation  
21 of appropriation works describing how the appropriation was completed.

1 (10) If a change in appropriation right is not completed as approved by the department or legislature or if the terms, conditions, restrictions, and  
2 limitations of the change approval are not complied with, the department may, after notice and opportunity for hearing, require the appropriator to show  
3 cause why the change approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke  
4 the change approval.

5 (11) The original of a change approval issued by the department must be sent to the applicant, and a duplicate must be kept in the office of the  
6 department in Helena.

7 (12) A person holding an issued permit or change approval that has not been perfected may change the place of diversion, place of use, purpose  
8 of use, or place of storage by filing an application for change pursuant to this section.

9 (13) A change in appropriation right contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may  
10 not knowingly permit, aid, or assist in any manner an unauthorized change in appropriation right. A person or corporation may not, directly or indirectly,  
11 personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section.

12 (14) The department may adopt rules to implement the provisions of this section.

13 (15) (a) An appropriator may change an appropriation right for a replacement well without the prior approval of the department if:

14 (i) the appropriation right is for:

15 (A) ground water outside the boundaries of a controlled ground water area; or

16 (B) ground water inside the boundaries of a controlled ground water area and if the provisions of the order declaring the controlled ground water  
17 area do not restrict such a change;

18 (ii) the change in appropriation right is to replace an existing well and the existing well will no longer be used;

19 (iii) the rate and volume of the appropriation from the replacement well are equal to or less than that of the well being replaced and do not exceed:

20 (A) 450 gallons a minute for a municipal well; or

21 (B) 35 gallons a minute and 10 acre-feet a year for all other wells;

1 (iv) the water from the replacement well is appropriated from the same aquifer as the water appropriated from the well being replaced; and

2 (v) a timely, correct and complete notice of replacement well is submitted to the department as provided in subsection (15)(b).

3 (b) (i) After completion of a replacement well and appropriation of ground water for a beneficial use, the appropriator shall file a notice of  
4 replacement well with the department on a form provided by the department.

5 (ii) The department shall review the notice of replacement well and shall issue an authorization of a change in an appropriation right if all of the  
6 criteria in subsection (15)(a) have been met and the notice is correct and complete. If the replacement well is located on national forest system lands, the  
7 notice is not correct and complete under this subsection (15) until the appropriator has submitted proof of any written special use authorization required  
8 by federal law to occupy, use, or traverse national forest system lands for the purpose of constructing the replacement well.

9 (iii) The department may not issue an authorization of a change in appropriation right until a correct and complete notice of replacement well has  
10 been filed with the department. The department shall return a defective notice to the appropriator, along with a description of defects in the notice. The  
11 appropriator shall refile a corrected and completed notice of replacement well within 30 days of notification of defects or within a further time as the  
12 department may allow, not to exceed 6 months.

13 (iv) If a notice of replacement well is not completed within the time allowed, the appropriator shall:

14 (A) cease appropriation of water from the replacement well pending approval by the department; and

15 (B) submit an application for a change in appropriation right to the department pursuant to subsections (1) through (3).

16 (c) The provisions of this subsection (15) do not apply to an appropriation right abandoned under 85-2-404.

17 (d) For each well that is replaced under this subsection (15), the appropriator shall follow the well abandonment procedures, standards, and rules  
18 adopted by the board of water well contractors pursuant to 37-43-202.

19 (e) The provisions of subsections (2), (3), (9), and (10) do not apply to a change in appropriation right that meets the requirements of subsection  
20 (15)(a).

21 (16) (a) An appropriator may change an appropriation right without the prior approval of the department for the purpose of constructing a redundant

1 water supply well in a public water supply system, as defined in 75-6-102, if the redundant water supply well:

2 (i) withdraws water from the same ground water source as the original well; and

3 (ii) is required by a state or federal agency.

4 (b) The priority date of the redundant water supply well is the same as the priority date of the original well. Only one well may be used at one time.

5 (c) Within 60 days of completion of a redundant water supply well, the appropriator shall file a notice of construction of the well with the department  
6 on a form provided by the department. The department may return a defective notice of construction to the appropriator for correction and completion. If  
7 the redundant water supply well is located on national forest system lands, the notice is not correct and complete under this subsection until after the  
8 appropriator has submitted proof of any written special use authorization required by federal law to occupy, use, or traverse national forest system lands  
9 for the purpose of constructing the redundant water supply well.

10 (d) The provisions of subsections (9) and (10) do not apply to a change in appropriation right that meets the requirements of this ~~section~~ subsection  
11 (16).

12 (17) The department shall accept and process an application for a change in appropriation right to instream flow to protect, maintain, or enhance  
13 streamflows pursuant to [section 2] and this section."

14  
15 **NEW SECTION. Section 19. Codification instruction.** (1) [Section 1] is intended to be codified as an integral part of Title 85, chapter 20, and  
16 the provisions of Title 85, chapter 20, apply to [section 1].

17 (2) [Section 2] is intended to be codified as an integral part of Title 85, chapter 2, and the provisions of Title 85, chapter 2, apply to [section 2].

18  
19 **NEW SECTION. Section 20. Effective date.** [This act] is effective on passage and approval.

20 - END -